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No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

WALTER FEINSTEIN, JACK KRIEGSMAN,
LEO MILLER, MORTON H. PASTOR and
JASON I. GREEN,
Petitioners,

VS.

NETTLESHIP CO. OF LOS ANGELES,
PACIFIC INDEMNITY COMPANY,
INSURANCE COMPANY OF NORTH AMERICA,
HARDWARE MUTUAL CASUALTY COMPANY,
AMERICAN RE-INSURANCE COMPANY, and
NORTH AMERICAN RE-INSURANCE CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

The single question of law presented for review by this Court is:

> Whether the willful creation and maintenance of an admittedly unlawful insurance monopoly which excludes competition and which substantially damages consumers of insurance is exempt from prosecution under the federal antitrust laws by the *McCarran-Ferguson Act*, 15 U.S.C. §§ 1011-1013.

PARTIES IN THE COURT OF APPEALS

The parties to the proceeding in the court below are those named in the caption of the case in this Court.

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I

OPINIONS BELOW

The opinion of the court of appeals below is reported at 714 F.2d 928 and is reprinted as Appendix A. Included in Appendix A is the order of the court of appeals denying rehearing en banc.

The various orders of the District Court pertinent to dismissal have not been officially published and are reprinted as Appendices E, G, H, K and L.

II

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The decision of the court of appeals was entered on September 1, 1983. A timely filed suggestion for rehearing en banc was denied by order entered on November 18, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and pursuant to Rule 20.4 of the Rules of the Supreme Court of the United States.

III

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

Federal jurisdiction in the District Court was invoked pursuant to 15 U.S.C. §§ 15 and 26 and pursuant to 28 U.S.C. § 1337(a).

IV

STATUTORY PROVISIONS INVOLVED

1. 15 U.S.C. §§ 1 and 2 [Sherman Act] provide in pertinent part:

Sec. 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Sec. 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.

2. 15 U.S.C. § 15 [Clayton Act] provides in pertinent part:

Sec. 15

(a) [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

3. 15 U.S.C. §§ 1011-1013 [McCarran-Ferguson Act] provide in pertinent part:

Sec. 1011

Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

Sec. 1012

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

Sec. 1013

(a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, and the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

V

STATEMENT OF THE CASE

A. The Nature of the Case

This is a private antitrust suit filed by five individual physicians on behalf of a class of physicians doing business in the County of Los Angeles and is brought under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26[1] to recover damages for and secure injunctive relief against defendants' violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. Specifically, petitioners alleged that defendants had unlawfully monopolized interstate trade and commerce in policies of medical malpractice insurance sold to physicians in the Southern California market [Complaint; Appendix N, ¶¶ 9-15].

During the period 1963-1970, defendant Pacific Indemnity Company [Pacific] acted to insure individal physicians doing business in the County of Los Angeles against medical malpractice risks through its exclusive agent defendant Nettleship Co. of Los Angeles [Nettleship]. The remaining defendants, Insurance Company of North America, American Re-Insurance Company, North American Re-Insurance Corporation, and Hardware Mutual Casualty Company, are carriers of medical malpractice insurance who, together with Pacific, Nettleship, Allstate Insurance Company and others, formed and participated in a "pool" to underwrite and divide profits from policies sold by

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[1]On November 3, 1980, the District Court noted that defendants had abandoned their monopoly and indicated that the request for injunctive relief might, for that reason, be moot [*Hearing*, 11/03/80 *TR.* pp. 4-13].

Pacific to petitioners and to other members of the alleged class.

Defendants admitted that they had unlawfully combined and conspired to privately monopolize, and had unlawfully monopolized, interstate trade and commerce respecting policies of insurance sold to petitioners and to other physicians in the Southern California market. They further admitted that they had exercised their unlawful monopoly power to exclude competition and to unlawfully fix insurance rates in violation of California statute.

Defendants claimed that, as a matter of law,[2] an unlawful insurance monopoly was exempt from antitrust scrutiny by reason of the *McCarran-Ferguson Act*, 15 U.S.C. §§ 1011-1013. The District Court agreed, and the complaint was dismissed. The court of appeals affirmed the orders of dismissal. Given the importance of the question of federal law presented, and the direct conflict between the opinion of the court of appeals below and applicable opinions of this Court, petitioners submit that there are special and important reasons for issuance of this Court's writ.

B. Initial Proceedings in the District Court

The complaint was filed on November 13, 1969. By March 30, 1970, all defendants had filed answers for the most

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[2]Thus, in moving for summary judgment on the Section 2 monopolization claims defendants represented to the District Court that:

> It would be probably absurd of us to come in here and ask the court to decide whether there was a combination or conspiracy and restraint of trade or monopolization or attempt to monopolize on a motion for summary judgment [*Hearing*, 11/05/81, *TR.* p. 15].

part denying the material allegations of the complaint and asserting affirmatively that the action was, as a matter of law, barred by the *McCarran-Ferguson Act*, 15 U.S.C. §§ 1011-1013.

On September 1, 1970, defendants jointly moved the District Court, on the basis of the *McCarran Act*, for "partial summary judgment" [dismissal] of all claims asserted in the complaint except "those based upon allegations of boycott, coercion or intimidation." Eleven months later, on August 2, 1971, the District Court entered its order granting defendants' motion as a matter of law. [*Order* 08/02/71; Appendix L].

On June 9, 1975, fifteen months after discovery had been ordered closed, defendants filed a joint motion for "summary judgment" [dismissal] on all remaining issues. The motion was taken under submission by the District Court on June 26, 1975. Twenty-six months later, on August 31, 1977, the District Court entered an opinion and order granting defendants' motion on the legal ground that, as "outsiders" to the insurance industry, petitioners lacked standing to sue for insurance industry antitrust violations. [*Order*, 08/31/77; Appendix K]. A notice of appeal from the orders of August 2, 1971 and August 31, 1977 was timely filed on September 28, 1977 [Appendix J].

C. Initial Proceedings on Appeal

On November 7, 1979, petitioners appeared before the Court of Appeals to offer oral argument on the question of whether an unlawful insurance monopoly was exempt from federal antitrust prosecution. Argument was not accepted. Instead, the court on its own motion entered the following order of remand:

> The case is remanded to the district court for reconsideration for a period of ninety-one days. Remand is prompted by the intervening decision of *St. Paul Fire & Marine Insurance Co. v. Barry*, 434 U.S. 919, S.Ct. 391, 54 L.Ed.2d 275.
>
> It is suggested that the district court lift its final judgment before reconsidering the case. It is observed that appellees maintain that the decision below may be sustained on other grounds than *Addrisi v. Equitable Life Assurance Society of the United States*, 503 F.2d 725 (9th Cir. 1974), *overruled* by *St. Paul Fire & Marine, supra.*
>
> On any appeal from a new final judgment, records and briefs from this case may be transferred on motion or stipulation to the new numbered appeal. The existing panel of this court is to have any new appeal concerning the case below. [*Order of Remand*, 11/07/79; Appendix I].

D. Post-Remand Proceedings in the District Court

On January 15, 1980, defendants filed a "joint motion for reaffirmance of summary judgment." The motion was unaccompanied by supporting affidavit and sought "reaffirmance" only as to the District Court's August 31, 1977 order of dismissal. On January 28, 1980, the court of appeals extended the ninety-one day period of remand for an additional sixty-three days. On March 28, 1980, the

District Court vacated entry of its August 31, 1977 order of dismissal [*Order*, 03/28/80; Appendix H]. On August 11, 1980, and after further extension of remand, the District Court decided defendants' motion for "reaffirmance" and ruled:

> The matter having come before the Court and having been taken under submission, and the Court having considered the record and being fully advised, and good cause appearing therefor, hereby ORDERS that defendants' motion for reaffirmance of summary judgment is DENIED, except as to the following issue: "Whether defendants coerced plaintiffs into the purchase of other types of insurance from defendants as a condition precedent to the purchase of medical malpractice insurance from defendants." [*Order*, 08/11/80; Appendix G].

On November 3, 1980, the parties appeared for ruling on petitioners' motion for class certification and for pretrial proceedings. Respecting the motion for class action certification, the District Court announced:

> The Court: Well, I suppose at long last the Court is faced with the necessity of giving its final and last ruling on the motion to certify under Rule 23, and it does appear to the Court that from the posture of the case it is appropriate to certify for class action treatment.
>
> And it appears that the class should be defined as those Los Angeles physicians who purchased medical malpractice insurance from defendants between the years 1963 and 1970.

> Other than what has been articulated, or expressed, in the past in regard to class action certification, or all other considerations under Rule 23, is there anything further to be added either in support of application for class action certification or in oppositon thereto?
>
> Very well. The order will be as just articulated by the Court. [*Hearing*, 11/03/80, *TR.* pp. 3-4].

In this connection the District Court noted the general nature of the unlawful monopoly which petitioners intended to prove at trial:

> [The Court] On the commonality aspects of it, if the plaintiffs' case, as the Court understands the plaintiffs to tell the Court it is his case, is to establish that in the times in question there was brought into existence, pursuant to plan by the defendant or defendants or some of them, an arrangement under which it was at least difficult, if not perhaps almost impossible, to pursue their malpractice [insurance] needs, except by following the course provided and indeed mandated by the actions of the defendants, and that pursuant thereto almost all, perhaps all, of the malpractice insurance written in the area was accomplished in that fashion, is the commonality requirement not thereby met?
>
> [Mr. Westbrook-Pacific Indemnity] I think if all of those conditions are satisfied which Your Honor stated, yes.
>
> [The Court] Aren't you going to prove a case of that kind by your representations, Mr. Appel?
>
> [Mr. Appel] Your Honor is stating it absolutely correctly. [*Hearing*, 11/03/80, *TR.* pp. 22, 23].[3]

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[3]The District Court specifically advised the parties that the case had "ultimately [been brought] down to the point where it is clear that you [plaintiffs] have the legal entitlement to make a case and, as the court has at least intimated, to make it as a class action case." [*Hearing*, 11/03/80, *TR.* pp. 42-43].

The District Court next advised that further consideration and implementation of its November 3, 1980 ruling on class certification would be assisted by a written compilation and submission of the evidence to be presented by plaintiffs on the liability issues. [*Hearing*, 11/03/80, *TR.*, pp. 15-17, 22-23]. On January 13, 1981, petitioners filed their "Further Submission Pursuant to Proceedings Held on November 3, 1980 Re Hearing on Motion for Certification of this Action As a Class Action" [*Further Submission*, 01/13/81]. Thereafter, on February 2, 1981, the parties again appeared before the District Court and the court again addressed the questions of violation and class certification:

> We are probably at the point in this case where the Court should make its order certifying the class . . .
>
> The aspect of the case which perhaps presents some confusion is whether the likely evidence in support of the existence of boycott, coercion and intimidation looks like price-fixing evidence, and it probably will look like price-fixing evidence, but it seems to the Court that it is, nevertheless, evidence that comes into the case if only, and not only on the issue of damages, but with respect to the class which the Court contemplates certifying, and that is, those Los Angeles physicians and surgeons who purchased medical malpractice insurance from defendants between the years 1963-1970.
>
> The Court is satisfied that there are the necessary circumstances of numerosity, common questions of law and fact, typicality, adequacy of representation—all of those things seem to be present so far as it is necessary for the Court to make a finding to that effect.
>
> And that is, that those matters predominate over the separate issues, and the Court makes such a finding. [*Hearing*, 02/02/81, *Tr.*, pp. 5, 6].

Commencing on March 30, 1981, defendants began a sequential filing of motions for summary judgment, again urging that their unlawful monopolization was exempt from federal antitrust scrutiny by the *McCarran-Ferguson Act* as a matter of law. No new facts or intervening change in law were shown or asserted. In opposing defendants' motions, petitioners directed the attention of the District Court to various portions of the Rule 56(c) record where it was established that:

(1) during the period 1963-1966, at least two independent competing carriers of medical malpractice insurance were in fact forced to withdraw from the Southern California market because of defendants' conduct;

(2) in September, 1966, defendants stated in secret written minutes that they had "little or no competition" for the sale of policies of medical malpractice insurance in Southern California;

(3) in August, 1968 and after all competition had been eliminated, defendants met and secretly agreed to increase medical malpractice premiums in Southern California by one hundred *percent;*

(4) in April, 1969, defendants stated in secret written minutes that they had achieved "a 98 to 99 percent market penetration," and stated that "abortive attempts to start new malpractice [insurance] companies have to date been unsuccessful;"

(5) in June, 1969, defendants threatened to cancel insurance policies issued to any Southern California physician who acquired stock in a newly-formed medical malpractice insurance company;

(6) in August, 1969, defendants met and secretly agreed to again increase medical malpractice premiums by an additional one hundred and ten *percent* because, as they then stated, "the doctors have nowhere else to go;"

(7) an actuary expert in medical malpractice insurance retained by the California Medical Association studied the market in issue and provided the CMA with and testified to his expert written and entirely supported opinion that the *maximum* increase in 1969 rates put into effect by defendants should have been 23% as opposed to 110%; and,

(8) in 1969, when one of the named plaintiffs complained to defendant Nettleship about defendants' monopoly, he was told by Nettleship that "we have a gun to your head and there is nothing you can do about it";

(9) in 1970, defendant Nettleship filed a 10 million dollar counterclaim against petitioners for the stated purpose of producing a "Mexican standoff" in this case;

(10) as of June 30, 1971, defendants had collected roughly 62 million dollars in medical malpractice premiums as against 25 million dollars in losses.

On November 5, 1981,[4] the parties appeared before the District Court for oral argument on defendants' motions for summary judgment. During the course of this hearing, defendants announced that the District Court could take an unlawful monopoly as established, and could accept as true all of the facts and testimony included and refer-

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[4]The case by this time had been reassigned from the Honorable Robert J. Kelleher to the Honorable William Matthew Byrne, Jr.

enced in the affidavits, declarations and memoranda relied upon by petitioners in opposition to defendants' various motions for summary judgment [Appendix E, p. 49; Appendix F]. Thus, the following colloquy occurred between the District Court and counsel:

> [The Court] Let me ask you [Pacific Indemnity] at this point: You say that there is no evidence that has been put forward by the plaintiffs to support the claim. Now, the moving parties, in their affidavits —perhaps of necessity, but do in fact rely in great part upon conclusions—that "we didn't do that, and we didn't do that." The plaintiffs then come back with more specific factual presentations. Is it your position that this motion for summary judgment should be decided on the premise that the facts that the plaintiffs present are true?
>
> [Mr. Westbrook] Yes, I don't think—I mean I don't really have any problem with that. I don't think it is a question of burden of proof or credibility or anything of that sort, Your Honor.
>
> [The Court] Then, it is not a question of a triable issue of fact, because, in effect, you are saying, then, everything they set forth in their affidavits is correct.
>
> [The Court] I will put it this way. All of their evidentiary presentation is correct.
>
> [Mr. Westbrook] We are not arguing that the Court should not accord whatever evidence they can point to, that bears on these specific issues, full credibility. No, Your Honor, we are not. In other words, yes, you may take it as true.
>
> [The Court] Well, so that the Court of Appeals, some day, if they have this before them, can have an understanding that it is almost like a trial on stipulated facts, so they won't have to search for triable issues of fact?

[Mr. Westbrook] I think that's correct, Your Honor. [*Hearing*, 11/5/81, *TR.*, pp. 16-17].

On June 28, 1982, the District Court filed its order granting defendants' motion for summary judgment. With respect to petitioners' monopolization claims the District Court observed:

> The complaint alleges that the Defendants, along with LACMA, combined and conspired to monopolize, restrain trade, fix prices, and suppress competition in the business of insurance in Los Angeles. . . . Monopolization and attempt to monopolize are included in the general allegations of ¶¶ 14 and 15 of the Complaint.
>
> • • •
>
> The Defendants' challenge to the monopolization claim is based on the allegations of the Complaint. Construed liberally, the Complaint alleges that the Defendants gained a monopoly position in the Los Angeles malpractice insurance market by illegal means and then charged monopoly prices to the Plaintiffs.
>
> Defendants maintain that the facts pleaded in the Complaint establish the affirmative defense of the McCarran-Ferguson Act. When a complaint reveals facts constituting an affirmative defense to a particular claim, that claim should be dismissed. . . . Although such a defect is generally challenged on a motion to dismiss, it may be raised on a motion for summary judgment as well.
>
> Plaintiffs respond that the Complaint does not trigger the McCarran-Ferguson defense because monopolization constitutes "boycott" or "coercion" and therefore falls within the exception to the Act's exemption. At issue, is the scope of the statutory terms "boycott" and "coercion." The meaning of statutory terms is determined by the court as a matter of law. [citation omitted] If "boycott" or "coercion" includes monopo-

> lization, then a claim for relief has been stated and Plaintiff may attempt to prove the claim. If not, summary judgment will be entered against the Plaintiff on the claim of monopolization. [*Order*, 06/28/82, Appendix E, pp. 32-33].

The District Court found that "monopolization is merely the exercise by a single entity, rather than a group, of the power to fix terms of dealing [and does not] amount to boycott or coercion." It thus granted defendants' motion for summary judgment concluding that, as a matter of law, the *McCarran-Ferguson Act*, 15 U.S.C. §§ 1011-1013, extends federal antitrust exemption to admittedly unlawful monopolization.[5]

On July 22, 1982, petitioners timely filed a notice of appeal and, on appeal, requested review and reversal of the District Court's orders extending *McCarran-Ferguson Act* exemption to an unlawful insurance monopoly.

E. Final Disposition in the Court of Appeals

On September 1, 1983, the court of appeals rendered its opinion and affirmed the District Court, concluding that an unlawful insurance monopoly was, as a matter of law, entitled to *McCarran-Ferguson Act* exemption, and could not properly be equated with boycott, coercion or intimidation, 714 F.2d 928, 933-935. A petition for rehearing en banc was timely filed on September 15, 1983 and denied by the court on November 18, 1983 [*Order*, 11/18/83; Appendix A].

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[5]Petitioners' position was that an unlawful monopoly constitutes boycott, coercion and intimidation of the highest order within the meaning of 15 U.S.C. § 1013(b), and, additionally, was clearly not the type of conduct which Congress intended to exempt under 15 U.S.C. § 1012(b).

VI

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A. Preliminary Statement—The Procedural Points

The complaint in this federal antitrust action alleges that the defendant insurers unlawfully monopolized an insurance market to the substantial damage of petitioners and other consumers of insurance. On motion by defendants the District Court held that a claim for unlawful monopolization had been stated under Section 2 of the *Sherman Act*, 15 U.S.C. § 2.[6] Based however on a legal conclusion that unlawful monopolization was not "economically coercive" conduct, the District Court dismissed the action as barred by the *McCarran-Ferguson Act*, 15 U.S.C. §§ 1011-1013 [Appendix E, pp. 45-46]. The court of appeals affirmed, finding that, as a matter of law, "monopoly alone is . . . not within any exception to the McCarran-Ferguson Act [exemption]" [Appendix A, p. 12].[7] Thus, the single

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[6]In the District Court defendants conceded the existence of genuine issues of material fact as to the lawfulness of their monopoly, and stipulated that the District Court would take as true the entire evidentiary showing made by petitioners [*Hearing*, 11/05/81; *TR.* p. 15; Appendix E, p. 49; Appendix F]. Thus, in considering whether an unlawful monopoly was exempt from the federal antitrust laws, the District Court found that defendants' "challenge to monopolization is based upon the complaint" [Appendix E, p. 33].

[7]Contrary to the procedure followed by the District Court, and contrary to the stipulation of the parties and the evidence, the court below purported to make findings of fact on appeal with respect to the merits of petitioners' claim for unlawful monopolization and attempted to construe petitioners' complaint as not alleging an unlawful monopolization [Appendix A, pp. 10-14]. At no time during the fifteen year pendency of this action did defendants so much as suggest that unlawful monopolization had not been properly

question of law presented for review by this Court is:

> Whether the willful creation and maintenance of an admittedly unlawful insurance monopoly which excludes competition and which substantially damages consumers of insurance is exempt from prosecution under the federal antitrust laws by the *McCarran-Ferguson Act*, 15 U.S.C. §§ 1011-1013.

The opinion of the court of appeals granting antitrust exemption to an admittedly unlawful insurance monopoly presents a question of federal law which is certain to have a very important effect upon the national economy and on the public and private enforcement of the federal antitrust laws as against unlawful insurance monopolies. Although the question of insurance monopoly exemption has not previously been presented squarely to this Court, the court of appeals has decided the question in a way which appears to conflict substantially with this Court's opinion in *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531 (1978) and other controlling authority.

B. The Question of Federal Law Presented Is of Substantial Importance to the National Economy

The decision below is truly startling in its actual and potential impact upon the national economy. As noted by this Court in *United States v. Southeastern Underwriters Association*, 322 U.S. 533, 64 S.Ct. 1162 (1944):

> The modern insurance business holds a commanding position in the trade and commerce of our Nation. Built upon the sale of contracts of indemnity, it has become one of the largest and most important branches

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pleaded. In fact, as noted above, the District Court expressly determined that unlawful monopolization had been stated in a manner sufficient to allow petitioners to prove that claim at trial [Appendix E, pp. 32-33].

> of commerce. . . . Perhaps no modern commercial enterprise directly affects so many persons in all walks of life as does the insurance business. Insurance touches the home, the family, and the occupation or the business of almost every person in the United States. *Id* 539-540.

In addition to denying remedy[8] to petitioners and the class members, the decision below conveys a clear message to the United States insurance industry that its members may act with impunity to unlawfully monopolize insurance markets in violation of federal antitrust statutes. Insurers and their agents are, under authority of the decision below, completely privileged to create and maintain monopolies in various insurance markets, and are free to do so notwithstanding that such conduct has been determined by Congress and by this Court as clearly inimical to the national interest. Thus, in applying the federal antitrust laws to the insurance industry[9] this Court stated:

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[8]In *Reiter v. Sonotone*, 442 U.S. 330, 99 S.Ct. 2326 (1979), this Court noted the strong interest of consumers in the proper and vigorous enforcement of the federal antitrust laws and observed:

> In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra*, after examining the legislative history of § 4, we described the Sherman Act as "conceived of primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers," and the treble-damages provision of the Clayton Act as "conceived primarily as 'open[ing] the door of justice to every man . . . and giv[ing] the injured party ample damages for the wrong suffered.'" . . . Congress created the treble-damages remedy of § 4 precisely for the purpose of encouraging *private* challenges to antitrust violations. These private suits provide a significant supplement to the limited resources available to the Department of Justice for enforcing the antitrust laws and deterring violations [emphasis in original; *Id.* 343-344].

[9]*United States v. Southeastern Underwriters Assn*, 322 U.S. 533 (1944).

> A general application of the [Sherman] Act to all combinations of business and capital organized to suppress commercial competition is in harmony with the spirit and impulses of the times which gave it birth. "Trusts" and "monopolies" were the terror of the period. Their power to fix prices, to restrict production, to crush small independent traders, and to concentrate large power in the few to the detriment of the many, were but some of numerous evils ascribed to them. The organized opponents of trusts aimed at the complete destruction of all business combinations which possessed potential power, or had the intent, to destroy competition in whatever the people needed or wanted. So great was the strength of the anti-trust forces that the issue of trusts and monopolies became non-partisan. The question was not whether they should be abolished, but how this purpose could best be accomplished [footnotes omitted; *Id.* 553-555]

Petitioners have for fifteen years persisted in the prosecution of this action because of the disastrous past and probable future effects of an unlawful monopoly on the business of physicians and others who must purchase insurance as a matter of economic necessity. As applied to the facts in this case, the rule of law announced by the court of appeals has the effect of granting full federal antitrust exemption to an unlawful monopoly which, after excluding all competition, arbitrarily quadrupled the prices charged to physicians for medical malpractice insurance, thus requiring a substantial number of physicians to drastically restrict and, in some instances, to altogether abandon their medical practices. Resolution by this Court of the issue of law presented by petitioners will necessarily have a significant impact upon both the business of insurance and the national public health care industry.

Petitioners respectfully submit that the resources of this Court would be well spent in reviewing the question presented. Review would both ensure continued enforcement of the federal antitrust laws in the insurance sector of the national economy, and would nip in the bud an erroneous rule of law promulgated by the court of appeals below which is bound to engender conflict and confusion in other courts of appeal and in the prosecution and maintenance of public and private actions for relief against unlawful monopolies.

C. The Decision Rendered by the Court of Appeals Decides a Question of Federal Law in a Way Which Conflicts with Applicable Decisions of this Court

1. Southeastern Underwriters and the McCarran-Ferguson Act

In *United States v. Southeastern Underwriters, supra,* this Court held that the business of insurance was sufficiently interstate in character for purposes of the *Sherman Act,* 15 U.S.C. §§ 1, 2. Subsequently, because of a threat by the insurance industry to not pay taxes assessed by the several states, and because certain insurance industry practices which might arguably violate the federal antitrust laws were permitted by some states as salutary and in the public interest, Congress enacted legislation[19] which declared that the states could properly continue to tax the business of insurance, and which declared that, after a three year moratorium, the federal antitrust laws would apply to the business of insurance to the extent such busi-

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[19] McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1013. Pertinent excerpts from the Congressional debates on the *McCarran-Ferguson Act* are reprinted in Appendix M to the instant petition.

ness was not regulated by state law, 15 U.S.C. §§ 1011-1012. At the same time, Congress expressly declared that, state regulation to the contrary notwithstanding, the federal antitrust laws would continue to apply fully to all agreements and acts of boycott, coercion and intimidation, 15 U.S.C. § 1013(b).

2. Monopoly and the McCarran-Ferguson Act

In *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531 (1978) this Court had occasion to consider the history, purpose and scope of the partial antitrust exemption afforded by the *McCarran-Ferguson Act*. Although the Court was divided on the legal question of standing which was then before it, the opinions filed in *St. Paul v. Barry* show that this Court was unanimous in its view that the partial exemption afforded by the *McCarran-Ferguson Act* did not extend to private insurance monopolies which were formed and maintained without state approval[11] or supervision. Thus, the majority opinion in *St. Paul* construed Section 1013(b) of the Act as rendering private insurance monopolies, created without state approval, subject to the federal antitrust laws and stated:

> "The debates make clear that the "boycott" exception was viewed by the Act's proponents as an important safeguard against the danger that insurance

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[11]The State of California expressly prohibits intrastate monopoly by insurers. Thus, California Insurance Code Section 790.33(c) prohibits "Entering into any agreement to commit, or by any concerted action committing, any boycott, coercion or intimidation resulting in or tending to result in unreasonable restraint of, or monopoly in, the business of insurance."

companies might take advantage of purely permissive state legislation to establish monopolies and enter into restrictive agreements falling outside the realm of state-supervised cooperative action.

• • •

In Senator O'Mahoney's view, "[t]he vice in the insurance industry . . . was not that there were rating bureaus, but that there was in the industry a system of private government which had been built up by a small group of insurance companies, which companies undertook by their agreements and understandings to invade the field of Congress to regulate commerce." 91 Cong.Rec. 1485 (1945). The conference substitute, he insisted, "outlaws completely all steps by which small groups have attempted to establish themselves in control in the great interstate and international business of insurance." *Ibid.* Perhaps the most revealing discussion is found in his explanation of why the language of § 3(b) was limited to "boycotts, coercion, or intimidation," and did not reach all combinations among insurance companies and their agents. He stated:

> "[T]he committee was cognizant of the fact that many salutary combinations might be proposed and which ought to be approved, to which there was no objection. From the very beginning, Mr. President, of this controversy over insurance I have always taken the position that I saw no objection to combinations or agreements among the companies in the public interest *provided those combinations and agreements were in the open and approved by law. Public supervision of agreements is essential.*

. . . . .

> "[M]y judgment is that *every effective combination or agreement to carry out a program against the public interest of which I have had any knowledge* in this whole industry study *would be prohibited by* [*§ 3(b)*]." 91 Cong.Rec. 1486 (1945) (emphasis supplied).
>
> The rules and regulations of private associations in the industry, while providing Senator O'Mahoney with a vivid example of "the sort of agreement which ought to be condemned," *ibid.*, exemplified a larger evil—"regulation by private combinations and groups," *id.*, at 1483—that required the continued application of the Sherman Act. [id. 547-549; footnotes omitted; emphasis in original]

Although dissenting from the majority's decision on standing to sue, Justices Stewart and Rehnquist read the Congressional debates and the statute to the same effect as the majority on the question of the necessity for state sanction or approval[12] of otherwise anticompetitive acts:

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[12]The proponents of the *McCarran-Ferguson Act* made it clear that it was state approval and supervision of certain insurance industry practices, and not state prohibition, which would trigger the partial exemption afforded by 15 U.S.C. § 1012(b):

> Mr. Pepper. Does that mean that the States can by their own laws defeat the applicability and operation of the Sherman Antitrust Act and the Clayton Act?
>
> Mr. O'Mahoney. I think the answer to that question will be clear when I point out that there are certain agreements which can normally be made in the insurance business which are in the public interest, but which might conceivably be a violation of the antitrust law, which prohibits combinations and agreements in restraint of trade.
>
> Mr. Pepper. Am I correct in saying that under the proviso which the Senator has just read, if a State made it an offense, under the laws of the State, to engage in combinations in restraint of trade, the Sherman Antitrust Act could not apply

> Repeatedly, Congressmen involved in the drafting of the statute drew a distinction between state regulation and private regulation. Congress plainly wanted to allow the States to authorize anticompetitive practices which they determined to be in the public interest, as indicated by formal state approval. Section 2(b) does just that. Congress just as plainly wanted to make sure that private organizations set up to govern the industry, such as the South-Eastern Underwriters Association, would not escape the reach of the federal antitrust laws. Section 2(b) also meets this concern to the extent that States do not authorize or sanction anticompetitive practices promoted by such organizations. [*Id.*, 565, footnotes omitted].

Petitioners have been able to find but a single reported decision where an attempt was made to bring monopolization within the *McCarran Act* exemption. In that case, *Travelers Insurance Corp. v. Blue Cross of Western Pennsylvania*, 306 F.Supp. 219 (1969), the court found that monopoly was not exempt as a matter of law and ordered a trial on the merits. The court in *Travelers, supra*, made it plain that, when a *bona fide* claim of monopolization under Section 2 is presented, "state approval"—even if present[13]

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to combinations and restraints of trade by companies engaged in business in that State? Is not that what it means?

Mr. O'Mahoney. No, I think that, for example, a rating bureau, formerly agreement among insurance companies, under the supervision and regulation of State would be permitted. 91 Congressional Record 1443, 1444.

[13]The Blue Cross hospital contracts in issue "were regulated and directed by the State of Pennsylvania under the Nonprofit Hospital Plan Act of 1937, 40 P.S. § 1401 *et seq.*, and were approved by the Pennsylvania Insurance Department after thorough consideration by it and after exhaustive public hearings on the matter." *Travelers Ins. Co. v. Blue Cross of Western Pennsylvania*, 361 F.Supp. 774, 776-779 (1972).

—is not dispositive as to *McCarran-Ferguson Act* exemption. Thus, in denying summary judgment and ordering that the case proceed to trial on the question of how Blue Cross achieved and exercised its market status the court noted the allegations of state approval and held that:

> Blue Cross counters that its acts are unassailable because they are mandated by the Insurance Commissioner of Pennsylvania. The doctrine enunciated in *Weiner v. Hospital Service Plan*, 13 Pa.Dist. & Co. R.2d 689, aff'd per curiam in 187 Pa.Superv. 244, 144 A.2d 575, however, to the effect that a statute requiring prior approval by a state insurance department of a non-profit hospitalization plan does not authorize the department to grant a monopoly to any one such corporation, compels the corollary that the department cannot thereby validate monopolistic practices by any one corporation. That all insurance industry acts of boycott, coercion, or intimidation condemned by the Sherman Act are subject to federal law is also clearly established in *Monarch Life Insurance Company v. Loyal Protective Life Insurance Company*, 326 F.2d 841 (2 Cir. 1963), cert. den. 376 U.S. 952, 84 S.Ct. 968, 11 L.Ed.2d 971.
>
> Travelers has, therefore, raised substantial factual issues concerning the competitive position and the competitive practices of Blue Cross in the insurance industry, which preclude the ascribing of McCarran Act immunity to the defendant on the present state of the record. 306 F.Supp. 219, 220-221.

Given the plain language of the statute, and given the reasoning of this Court in *St. Paul v. Barry*, petitioners submit that, although there are insurance industry combinations and practices which fall within the partial exemption provided by Section 1012(b), an admittedly unlawful

private monopoly is not one of them.[14] If there is any insurance industry practice which must, on any reading of the Act, remain open to federal antitrust scrutiny it is unlawful monopolization. Indeed, unlawful private monopoly is a paradigm[15] of the type of conduct which Congress intended be encompassed by Section 1013(b) and, for obvious reasons, denied the partial antitrust exemption afforded by Section 1012(b).

Petitioners submit that, since defendants' unlawful monopolization was neither approved nor sanctioned by state law,[16] defendants are not entitled to the partial antitrust exemption afforded by Section 1012(b), which exemption is

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[14]In *St. Paul v. Barry, supra*, this Court held that the conduct there considered fell squarely within the language and intendment of 15 U.S.C. § 1013(b) because it "effectively foreclos[ed] all possibility of competition anywhere in the relevant market" *Id* 533. This is, of course, the precise effect of the admittedly unlawful monopoly before this Court on the present record.

[15]The lower court's conclusion that monopoly is not economically coercive conduct contravenes the meaning and signification of Section 2 of the Sherman Act as it has been construed by numerous decisions of this Court, *Standard Oil v. United States*, 221 U.S. 1 (1910); *United States v. Swift & Co.*, 286 U.S. 106 (1932); *United States v. Alcoa*, 148 F.2d 416 (1945); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United States v. E. I. DuPont De Nemours*, 351 U.S. 377 (1956); *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972).

[16]The view espoused by this Court in *St. Paul v. Barry* respecting the necessity for state approval and supervision has been adhered to by courts of appeal other than the court of appeals below. Thus, in *Owens v. Aetna*, 654 F.2d 218 (3d Cir.), *cert. denied* 554 U.S. 1092 (1981), the court correctly observed that, in passing the McCarran Act, Congress believed that "fixing of rate without statutory authority in the state [was wrong]," and observed that Congress clearly "did not intend to permit private price-fixing which the antitrust act forbids." *Id*, pp. 225.

limited to those situations in which a state has determined that certain anticompetitive conduct is in the public interest of its citizens. The court of appeals' decision to the contrary conflicts substantially with this Court's opinion in *St. Paul v. Barry, supra,* and must be reversed.

CONCLUSION

The decision of the court of appeals holding that an unlawful monopoly is entitled to exemption from prosecution under the federal antitrust laws is entirely without precedent. Defendants' assertion,[18] adopted by the District Court, and affirmed on appeal, that an unlawful monopoly is "merely the use of economic leverage to exact trade terms, not 'boycott' or 'coercion' " is a legal sophistication which is both unsupported and unsupportable.

An unlawful monopoly cannot be characterized as economically benign. It is, as common sense suggests, coercive in a way which can be appreciated completely by those who are made to suffer its effects. A privately created, unlawful insurance monopoly neither is nor should be characterized as anything other than extortion. It plainly is conduct which should be made "to pass muster under the Sherman Act," *St. Paul v. Barry,* id. 649, ftnt. 21.

For all the reasons stated, petitioners respectfully pray that this Court issue its writ and review and reverse the opinion of the court of appeals below, and permit peti-

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[18] [Appendix E, pp. 34, 45-46].

tioners to proceed to a trial on the merits of their monopolization claim.

Respectfully submitted,

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83-1381

No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

WALTER FEINSTEIN, JACK KRIEGSMAN,
LEO MILLER, MORTON H. PASTOR and
JASON I. GREEN,
Petitioners,

VS.

NETTLESHIP CO. OF LOS ANGELES,
PACIFIC INDEMNITY COMPANY,
INSURANCE COMPANY OF NORTH AMERICA,
HARDWARE MUTUAL CASUALTY COMPANY,
AMERICAN RE-INSURANCE COMPANY, and
NORTH AMERICAN RE-INSURANCE CORPORATION,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Appendix A

Walter Feinstein, Jack Kriegsman, Leo Miller, Morton H. Pastor and Jason I. Green, Plaintiffs/Appellants,

v.

Nettleship Co. of Los Angeles, Pacific Indemnity Company, Insurance Company of North America, Sentry Insurance, American Re-Insurance Company, and North American Re-Insurance Corporation, Defendants/Appellees.

Nos. 77-3998, 82-5698.

United States Court of Appeals,
Ninth Circuit.

Argued May 10, 1983.

Submitted Aug. 10, 1983.

Decided Sept. 1, 1983.

Before CHAMBERS, ANDERSON and SCHROEDER, Circuit Judges.

SCHROEDER, Circuit Judge.

This is a protracted antitrust action by physicians against the insurance agent and carriers who provided medical malpractice insurance to members of the Los Angeles County Medical Association. The question is whether the defendants' alleged domination of the medical malpractice insurance market in Southern California, through an agreement with the medical association, is immune from antitrust attack. The district court held that the defendants' conduct was the business of insurance and was regulated by the state. It therefore concluded that the antitrust claims were barred

by the McCarran-Ferguson Act exemption to the antitrust laws, 15 U.S.C. § 1012. In addition, the court held that defendants' conduct did not fall within the boycott exception to that Act, 15 U.S.C. § 1013(b). It granted summary judgment in favor of the defendants. We affirm for the reasons set forth below.

I. FACTS AND PROCEDURAL HISTORY

Plaintiffs-appellants Walter Feinstein, Jack Kriegsman, Leo Miller, Morton H. Pastor, and Jason I. Green, are doctors in Los Angeles County who at various times between 1963 and 1969 purchased medical malpractice insurance through defendant-appellee Nettleship Company. Nettleship was an underwriting manager for medical malpractice insurance, and was the approved agent for the Los Angeles County Medical Association (LACMA) throughout the relevant period. Defendant Pacific Indemnity was one of the insurance carriers. The other companies named in the complaint were reinsurers.

It is undisputed that at the time this lawsuit began, most professional medical liability insurance in California was written on a group basis. The doctors negotiated with the insurance company through local medical associations. The insurance company issued a master policy to the association, and the participating physicians, in turn, received certificates of insurance.

The facts in this case reflect that pattern. In a written agreement LACMA designated the Nettleship Company the "sole and exclusive agent approved by the association." Nettleship issued a master policy to LACMA and certifi-

cates of insurance to the covered doctors. In exchange for exclusive agency, Nettleship agreed not to limit coverage to low risk areas, but to include high risk specialties as required by the members. The agreement also addressed claims handling and provided for the revision of rates, pursuant to annual reports regarding Nettleship's net profits.

In order to buy through Nettleship, a physician was required to be a member of LACMA, but LACMA members were free to purchase medical malpractice insurance elsewhere if they chose. For part of the period in issue, the "exclusivity" provision was not respected, for LACMA used an additional insurance agent. Nettleship, however, gained an increasing share of the medical malpractice insurance market in Southern California, and, during the late sixties it imposed substantial, successive rate increases. In 1969, plaintiffs filed their complaint in this case alleging conspiracy to monopolize and monopolization, price-fixing and tied sales, as well as boycott, fraud and coercion.

In 1971, the district court granted the defendants summary judgment on price-fixing and related claims, on the ground that insurance rate-setting was regulated by state law and thus fell within the exemption of the McCarran-Ferguson Act. 15 U.S.C. §§ 1011-15. In 1977, the district court granted summary judgment on the remaining antitrust claims, holding that the entire action was barred by the McCarran-Ferguson Act and that the plaintiff-physicians, as policyholders, lacked standing to raise the boycott exception in 15 U.S.C. § 1013(b). The district court's holding on standing was dictated by our decision in *Addrisi v. Equitable Life Assurance Society of the United States*, 503 F.2d 725 (9th Cir.1974), *cert. denied*, 420 U.S. 929, 95

S.Ct. 1129, 43 L.Ed.2d 400 (1975). After the 1977 district court decision in this case, however, that aspect of *Addrisi* was overruled by *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 98 S.Ct. 2923, 57 L.Ed.2d 932 (1978) which held that policyholders may invoke the boycott exception. In 1979, this court therefore remanded for reconsideration in light of *Barry*.

Following remand the district court in 1980 granted partial summary judgment for the defendants on plaintiffs' tying claims. In 1982, the district court granted summary judgment to defendants on all remaining issues on the ground that the action was barred by the McCarran-Ferguson Act and that the defendants' conduct did not constitute a boycott under 15 U.S.C. § 1013(b). There is no factual dispute and we review solely to determine whether defendants were entitled to judgment as a matter of law. *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau*, 690 F.2d 1240, 1250 (9th Cir.1982), *cert. denied*, ... U.S. ....., 103 S.Ct. 1234, 75 L.Ed.2d 468 (1983).

II. DISCUSSION

The McCarran-Ferguson Act provides that:

> (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance.... *Provided*, that ... the Sherman Act, and ... the Clayton Act, and ... the Federal Trade Commission Act ... shall be applicable to the business of insurance to

> the extent that such business is not regulated by state law.

15 U.S.C. § 1012.

Section 1013(b) of the McCarran-Ferguson Act provides that

> Nothing contained in this act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

The McCarran-Ferguson Act creates an antitrust exemption for the business of insurance which was prompted by the Supreme Court's departure in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944) from prior holdings that insurance is not a transaction in interstate commerce. *See Barry*, 438 U.S. at 538-39, 98 S.Ct. at 928-29. The Act was passed in response to widespread concern that the states would be permitted to continue regulating and taxing the insurance industry. It provides an exemption from the antitrust laws for the business of insurance, but only to the extent that such business is regulated by the state, and does not involve a boycott, coercion or intimidation. *Id.* at 539-40, 98 S.Ct. 2929; *Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau*, 701 F.2d 1276, 1284 (9th Cir.1983), *petition for cert. filed*, 51 U.S.L.W. 3884 (U.S. June 14, 1983) (No. 82-1969).

Plaintiffs in this appeal contend both that the defendants' agreement with LACMA was not exempt as the business of insurance, and that even if it otherwise qualifies for exemption, it falls within the boycott-coercion exception. We address these contentions in turn.

A. *The Business of Insurance and State Regulation*

The Supreme Court has set forth three factors to consider in determining whether a practice constitutes the business of insurance: (1) whether the practice has the effect of transferring or spreading the policyholders' risks; (2) whether the practice is an integral part of the policy relationship between the insurer and insured; and (3) whether the practice is limited to entities within the insurance industry. *Union Labor Life Insurance Co. v. Pireno*, ... U.S. ....., ..., 102 S.Ct. 3002, 3009, 73 L.Ed.2d 647 (1982). This court has discussed these factors in two recent decisions, both of which emphasize that the primary characteristic of the business of insurance is the transferring or spreading of risk. *Klamath-Lake*, 701 F.2d at 1285; *United States v. Title Insurance Rating Bureau of Arizona*, 700 F.2d 1247, 1251 (9th Cir. 1983). Provided the risk spreading factor is present, the business of insurance is not limited to traditionally recognized areas of insurance. *See Klamath-Lake*, 701 F.2d at 1286-87. In *Klamath-Lake*, we held that the practice of shifting the risk of pharmacy costs, as well as medical costs, qualified as the business of insurance. *Id.* at 1287.

In this case, which involves a conventional field of insurance, plaintiffs offer no very clear articulation of the practice which they seek to challenge as violative of the antitrust laws and outside the business of insurance. It appears, however, that for purposes of bringing this suit outside the scope of the McCarran-Ferguson Act, plaintiffs have focused their ire upon the agreement between the medical association and the insurers to offer the malpractice insurance only to members of LACMA.

That practice is, however, demonstrably related to the allocation and spreading of risk, for, as the district court

pointed out, it defines a pool of insureds over which risk is spread. The medical association sought to provide a single insurance broker for all of its members in order to assure coverage for certain high-risk specialties, thereby distributing risk across the membership. The effect is to spread risk across a wide area, and that is precisely what the Supreme Court described when it formulated the risk spreading criterion. *See Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 212-13, 99 S.Ct. 1067, 1073-74, 59 L.Ed.2d 261 (1979).

The Third Circuit identified the risk spreading characteristic of this practice when it recently held that offering insurance through a state medical association is the business of insurance. *Owens v. Aetna Life & Casualty Co.*, 654 F.2d 218 (3d Cir.), *cert. denied*, 454 U.S. 1092, 102 S.Ct. 657, 70 L.Ed.2d 631 (1981). The Third Circuit underlined the fact that mass marketing of malpractice insurance through an association is one way of maximizing the risk pool of medical specialties. *Id.* at 223. The *Owens* court was further influenced by the fact that cooperative rate-making schemes have long been recognized as the business of insurance, and were clearly contemplated by the proponents of the McCarran-Ferguson Act. *Id.* at 225; *accord Royal Drug*, 440 U.S. at 222-24, 99 S.Ct. at 1078-80. These considerations apply with equal force here.

Contrary to the plaintiffs' contention, the agreement in this case is wholly unlike the agreement providing peer review of chiropractors' fees in *Pireno*, or the agreement between the insurer and pharmacists to offer low cost drugs to policyholders in *Royal Drug*. The Supreme Court held those practices were not part of the business of insurance

because they were aimed solely at cutting insurers' costs and had nothing to do with the allocation of risk. *Pireno*, ... U.S. at ....., 102 S.Ct. at 3010; *Royal Drug*, 440 U.S. at 216-17, 99 S.Ct. at 1075-76. The practice here is related to risk allocation, and is not a cost-cutting device.

Despite these distinctions, plaintiffs attempt to bring their claims under the Supreme Court precedents by focusing upon the fact that this arrangement was negotiated by the medical association on behalf of its members. Their argument seems to be that since the association is neither the insured nor the insurer, the arrangement is not "limited to entities within the insurance industry" and therefore does not meet the third prong of the *Pireno* test. *See* ..... U.S. at ....., 102 S.Ct. at 3009. Plaintiffs describe LACMA, the entity which negotiated the terms of the insurance on behalf of the insureds, as "strangers" to the insurer-insured relationship. *Pireno*, however, suggests that a non-insurer (or non-insured) party's involvement does not necessarily defeat antitrust exemption, but is of concern where the agreement has the potential to restrain competition in non-insurance markets. *Id.* at ....., 102 S.Ct. at 3010-11. Thus *Pireno* appears to be satisfied where, as here, the only role of the non-insurer is in negotiating the terms of the policy relationship between insurer and insured, and the gravamen of the complaint is lack of competition in the insurance market itself.

Offering insurance to members of a group through an association or employer which is not the insured is a practice common to all group insurance plans. R. Keeton, *Insurance Law* § 2.8(a) (1971). The occupy an increasingly larger share of the overall insurance market in the United States. *See* W. Meyer, *Life and Health Insurance*

Law § 19:1 (1972); W. Vance, *Law of Insurance* § 203 (3d ed. 1951). The law generally views the intermediary who negotiates the insurance contract as the agent either of the insured or the insurer, not as a party pursuing its own objectives. *See* W. Meyer, *supra*, § 23. Plaintiffs do not offer any reason why the intermediary should be treated differently for antitrust purposes, or why group insurance should be treated any differently from insurance obtained directly by the insured. Nor do they contend that there is any authority either in the McCarran-Ferguson Act, its history, or in any judicial interpretation, that group insurance is not "the business of insurance." Indeed, the proposition is directly contrary to the Third Circuit's decision in *Owens*. We therefore conclude that the agreement between LACMA and defendants is the "business of insurance" within the meaning of the McCarran-Ferguson Act.

To be exempt under that Act, however, a practice must not only be "the business of insurance," it must also be regulated by the state. *Royal Drug*, 440 U.S. at 219, 99 S.Ct. at 1077. It is not necessary to point to a state statute which gives express approval to a particular practice; rather, it is sufficient that a state regulatory scheme possess jurisdiction over the challenged practice. *See Klamath-Lake*, 701 F.2d at 1287 & n. 10; *Addrisi*, 503 F.2d at 728; *accord*, P. Areeda, *Antitrust Law* ¶ 210.1b (Supp. 1982). California has an extensive regulatory scheme with jurisdiction over all rating practices of insurers, and which grants the insurance commissioner broad investigatory and enforcement powers. *See, e.g., Calif.Ins.Code* §§ 1852-1853.9, 12919-12931. The state regulation requirement clearly is satisfied in this case.

B. *The Boycott-Coercion-Intimidation Exception to the McCarran-Ferguson Act*

Since we have determined that the object of plaintiffs' challenge is within the business of insurance and regulated by California, we must now consider the plaintiffs' contention that even if their suit is otherwise barred by the McCarran-Ferguson Act exemption from antitrust liability, it falls within the exception to that Act.

The McCarran-Ferguson Act specifies that antitrust exemption will not extend to "any agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation." 15 U.S.C. § 1013(b): Plaintiffs do not contend that the agreement itself forced them to buy the LACMA sponsored insurance from the defendants, or that it prevented them from dealing with other insurers. The only limitation in the agreement, and of which they complain, is the requirement that doctors join LACMA as a prerequisite to being insured by defendants. Indeed, not only were doctors free to purchase insurance elsewhere, whether or not they joined LACMA, but several doctors in this case were covered by other companies at times during the relevant period. Because it in no way limited the doctors' ability to deal with third parties, the agreement itself is not an agreement to boycott or coerce the plaintiffs to purchase the defendants' insurance. *See Barry*, 438 U.S. at 553, 98 S.Ct. at 2935-36; *Klamath-Lake*, 701 F.2d at 1287-88; *Procter v. State Farm Mutual Automobile Insurance Co.*, 561 F.2d 262, 275 (D.C.Cir.1977), *vacated on other grounds*, 440 U.S. 942, 99 S.Ct. 1417, 59 L.Ed.2d 631 (1979); *Travelers Insurance Co. v. Blue Cross of West Pennsylvania*, 481 F.2d 80, 84 (3d Cir.), *cert. denied*, 414 U.S. 1093, 94 S.Ct. 724, 88 L.Ed.2d 550 (1973); *cf.* Barber, *Refusals*

to Deal Under the Federal Antitrust Laws, 103 U.Pa.L.Rev. 847, 876-77 (1955) (quoted in *Joseph E. Seagram and Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.,* 416 F.2d 71, 77 (9th Cir.1969), *cert. denied,* 396 U.S. 1062, 90 S.Ct. 752, 24 L.Ed.2d 755 (1970)). There is no "agreement to boycott, coerce or intimidate" within section 1013(b).

Plaintiffs do not contend otherwise, but stress instead that because as a practical matter, the defendants' plan became the only medical malpractice plan available to doctors in the Los Angeles area, they were forced to buy this insurance. They argue that the existence of defendants' monopoly power was inherently coercive, and is therefor within the boycott-coercion exception. Plaintiffs' theory thus rests squarely upon an attempt to equate section 2 monopolization claims with the McCarran-Ferguson Act exceptions; for several reasons, it must fail.

First, the Supreme Court expressly stated in *Barry* that the boycott and coercion exceptions are not as broad as the Sherman Act itself.

> We note our disagreement with Mr. Justice STEWART's expression of alarm that a reading of the operative terms of § 3(b), consistent with traditional Sherman Act usage, "would plainly devour the broad antitrust immunity bestowed by § 2(b)." *Post,* at 2938. Whatever the precise reach of the terms "boycott," "coercion," and "intimidation," the decisions of this Court do not support the dissent's suggestion that they are coextensive with the prohibitions of the Sherman Act. *See, e.g., Eastern States Lumber Ass'n v. United States,* 234 U.S. 600, 611, 34 S.Ct. 951, 954, 58 L.Ed. 1490 (1914), quoting *Gompers v. Bucks Stove & Range Co.,* 221 U.S. 418, 438, 31 S.Ct. 492, 496, 55 L.Ed. 797 (1911).

438 U.S. at 545 n. 18, 98 S.Ct. at 2932 n. 18.

Thus even if plaintiffs could establish a violation of section 2 of the Sherman Act in this case, some additional act or agreement constituting boycott, coercion or intimidation would have to be shown. None is alleged.

The legislative history of the McCarran-Ferguson Act further repudiates plaintiffs' position. During the debate on the proposed bill, Senator Ferguson clearly distinguished between monopolistic practices on the one hand and boycott, coercion or intimidation on the other. He explained that monopolistic practices, within the business of insurance and regulated by the state, would be permitted under the statute, while boycotts, coercion or intimidation would not. 91 Cong.Rec. 480-81 (1945) (statement of Sen. Ferguson).[1] Monopoly alone is therefore not within any exception to the McCarran-Ferguson Act.

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[1]Relevant portions of the Senate debate on the proposed bill are set forth below.

> Mr. FERGUSON. • • • [B]y no means does the bill *anticipate* that any act would or should be passed which would create monopoly.
>
> Mr. O'MAHONEY. Then, does the Senator believe that the bill as it now stands *permits* that interpretation?
>
> Mr. FERGUSON. *It would permit it.* • • I think the bill is broad enough to allow a state to pass a law allowing any agreement or contract other than those inhibited in paragraph (b) of section 4. But it is not the purpose of the bill at all to foster monopoly, or to anticipate that any act will be passed permitting or even encouraging monopoly. *A state law* • • • relating to regulation, for instance, the fixing of rates, or the fixing of the terms of a contract of insurance, *which might under some definitions of monopoly be monopolistic, would be permitted under the pending bill;* but if the state law undertook to authorize a boycott, a coercion, or an intimidation, or an agreement to do any one of those three things, then it would be clearly void because Congress would have already spoken, and once Congress speaks on interstate commerce, no state can speak contrary to the congressional declaration. 91 Cong. Rec. 480-81 (1945) (emphasis added).

There is still an additional flaw in plaintiffs' argument. To recover, they must show not only that they have in some sense suffered the effects of boycott, coercion or intimidation, but that there has been some violation of the antitrust laws. *See Pireno*, ... U.S. ....., 102 S.Ct. at 3007. Thus in order to succeed, they cannot rest solely upon the position that a monopoly is "coercive" within the meaning of the McCarran-Ferguson Act exception. They must also persuade the court to hold that the existence of monopoly power alone is a section 2 violation of the Sherman Act.

Although such an approach to monopolization liability has been discussed approvingly, *see* L. Sullivan, *Law of Antitrust* § 38 at 104 & n. 6 (1977), it is not accepted in this circuit. Our cases hold that a section 2 monopolization claim requires two principal elements in addition to antitrust injury: (1) possession of monopoly power in the relevant market and (2) willful acquisition or maintenance of that power. *Betaseed, Inc. v. U and I, Inc.*, 681 F.2d 1203, 1230 (9th Cir.1982); *Phonetele, Inc. v. American Telephone and Telegraph Co.*, 664 F.2d 716, 739 (9th Cir.1981), *cert. denied*, ... U.S. ....., 103 S.Ct. 785, 74 L.Ed.2d 992 (1983); *Greyhound Computer Corp., Inc. v. International Business Machines Corp.*, 559 F.2d 488, 492 (9th Cir.1977), *cert, denied*, 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1978). Plaintiffs insist that it is sufficient to allege that defendants had a "mere" monopoly. We require more from a section 2 claimant for, as we recently stated,

> [i]t is the second element, the conduct element, which distinguishes lawful possession of monopoly power from unlawful possession of monopoly power. Section 2 of the Sherman Act proscribes "monopolization"; it does not render unlawful all monopolies.

Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 543 (9th Cir.1983). Thus plaintiffs' theory of recovery, which is bottomed solely upon their view of the oppressive nature of monopoly, would not constitute a claim of antitrust violation. We plainly cannot hold that the exception to the McCarran-Ferguson Act is a broader ground for liability than the Sherman Act itself, a conclusion which is the inevitable result of plaintiffs' logic.

Plaintiffs raise additional arguments on appeal in this thirteen-year-old lawsuit which, as we observed in addressing like arguments in a similarly protracted antitrust suit, seek only to sustain this action's "flickering life." *Klamath-Lake*, 701 F.2d at 1292. We are persuaded upon reviewing the record that the district court considered the facts which plaintiffs alleged as true, and complied fully with the dictates of Fed.R.Civ.P. 56. *See Clipper Exxpress*, 690 F.2d at 1250. The plaintiffs claim for the first time on appeal that there is a triable issue of fact with respect to their tying claims, but we decline to address that issue for the first time at this stage. *See Scott v. Pacific Maritime Ass'n*, 695 F.2d 1199, 1203 (9th Cir.1983); *Fitzgerald v. Century Park, Inc.*, 642 F.2d 356, 359 (9th Cir.1981).

The judgment of the district court is affirmed.

In the United States Court of Appeals
For the Ninth Circuit

Nos. 77-3998 and 82-5698
(Central District of California)

Walter Feinstein, Jack Kriegsman, Leo Miller,
Morton H. Pastor and Jason I Green,
Plaintiffs/Appellants,

vs.

Nettleship Co. of Los Angeles, Pacific Indemnity Company,
Insurance Company of North America, Sentry Insurance,
American Re-Insurance Company, and North American
Re-Insurance Corporation,
Defendants/Appellees.

[Filed Nov. 18, 1983]

ORDER

Before: CHAMBERS, ANDERSON, and SCHROEDER,
Circuit Judges.

The panel as constituted above, in considering Plaintiff-Appellants' Petition for Rehearing and Suggestion for Rehearing En Banc, has read the "Declaration of Counsel Re Petition for Rehearing and Suggestion for Rehearing En Banc" and reviewed the late filed portions of the record. The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Appendix B

United States Court of Appeals
For the Ninth Circuit

Nos. 77-3998, 82-7205

Walter Feinstein, et al.,
Appellants-Petitioners,

vs.

Nettleship Co. of Los Angeles, et al.,
Defendants-Appellees.

[Filed Aug. 13, 1982]

ORDER CONSOLIDATING APPEALS
and
QUERY TO COUNSEL

Before: CHAMBERS, ANDERSON and SCHROEDER, Circuit Judges.

These appeals are ordered consolidated for all purposes and they are assigned to Judges Chambers, Anderson and Schroeder.

Query to counsel: Can the parties within seven (7) days from the date of the filing of this order stipulate as to a supplemental briefing schedule? If they can, they should advise the Clerk so that the panel may set a date for oral argument.

For the court:
/s/ Richard H. Chambers
United States Circuit Judge

United States Court of Appeals
For the Ninth Circuit

Nos. 77-3998, 82-5698

Walter Feinstein, et al.,
Appellants-Petitioners,

vs.

Nettleship Co. of Los Angeles, et al.,
Defendants-Appellees.

[Filed Aug. 18, 1982]

ORDER CORRECTING ORDER OF
AUGUST 13, 1982

Before: CHAMBERS, ANDERSON and SCHROEDER, Circuit Judges.

The caption of the Order Consolidating Appeals and Query to Counsel, filed August 13, 1982, in No. 77-3998, and (incorrectly) in No. 82-7205, is hereby amended to show that the cases that are there consolidated are No. 77-3998 and No. 82-5698.

For the Court:
/s/ Richard H. Chambers
United States Circuit Judge

Appendix C

United States Court of Appeals
For the Ninth Circuit

Nos. 77-3998, 82-7205

Walter Feinstein; Jason I. Green; Jack Kriegsman; Leo Miller; and Norton H. Pastor,
Plaintiffs,

vs.

Nettleship Co. of Los Angeles; Pacific Indemnity Company; Insurance Company of North America; Sentry Insurance; American Re-Insurance Company; and North American Reinsurance Corporation,
Defendants.

[Filed July 29, 1982]

ORDER RESUMING JURISDICTION AND DEFERRING SUBMISSION

Before: CHAMBERS, ANDERSON and SCHROEDER, Circuit Judges.

The last extension of the remand has expired. We resume jurisdiction and submission of these proceedings is deferred pending further order of the court.

We are informed by the clerk of the district court that a final decision on summary judgment has been entered in the district court. Contrary to this court's instructions, none of the parties has advised this court of the conclusion of the proceedings in the district court. Within seven (7)

days from the date of the filing of this order, the petitioners-appellants shall advise the court in writing whether or not they intend to pursue the proceedings now pending in this court.

IT IS SO ORDERED.

For the Panel:
/s/ Richard H. Chambers
United States Circuit Judge

Appendix D

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Attorneys for Plaintiffs

United States District Court
Central District of California

CV-69-2301-WMB

Walter Feinstein; Jason I. Green;
Jack Kriegsman; Leo Miller; and
Norton H. Pastor,
Plaintiffs,

vs.

Nettleship Co. of Los Angeles;
Pacific Indemnity Company;
Insurance Company of North America;
Sentry Insurance;
American Re-Insurance Company;
and North American Reinsurance Corporation,
Defendants.

[Filed July 22, 1982]

NOTICE OF APPEAL

Notice is hereby given that, pursuant to Rules 3 and 4 of the Federal Rules of Appellate Procedure; the Order of Remand filed by the United States Court of Appeal for

the Ninth Circuit on November 7, 1979 in No. C.A. 77-3998; and, pursuant to the Notice of Appeal filed herein on September 28, 1977, plaintiffs above-named hereby appeal to the United States Court of Appeal for the Ninth Circuit from the Order and Opinion of the District Court filed herein on August 2, 1971; the Memorandum and Decision of the District Court entered herein on August 31, 1977; the Memorandum of Decision and Order filed by the District Court on March 3, 1980; the Order of the District Court entered on August 11, 1980; the Order filed by the District Court on December 24, 1981; the Order Granting Defendants' Motion for Summary Judgment entered by the District Court on June 28, 1982, and, from the Judgment entered by the District Court on June 28, 1982.

Pursuant to the Order of Remand filed by the United States Court of Appeal for the Ninth Circuit on November 7, 1979 in C.A. No. 77-3998, plaintiffs request that all records and briefs from the appeal previously taken by them in No. 77-3998 be transferred to this appeal. Plaintiffs observe that the instant appeal is, pursuant to the said November 7, 1979 Order of Remand, to be assigned to Circuit Judges Chambers, Anderson and Schroeder.

Dated: July 21, 1982

Respectfully submitted,
Alioto & Alioto
Lawrence John Appel
s/ Lawrence John Appel
Lawrence John Appel
Attorneys for Plaintiffs

Appendix E

United States District Court
Central District of California

CV 69-2301-WMB

Walter Feinstein; Jason I. Green;
Jack Kriegsman; Leo Miller; and
Norton H. Pastor,
Plaintiffs,

v.

Nettleship Co. of Los Angeles;
Pacific Indemnity Company;
Insurance Company of North America;
Sentry Insurance;
American Re-Insurance Company; and
North American Reinsurance Corporation,
Defendants.

[Filed June 28, 1982]

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This proposed class action is an antitrust challenge to a group malpractice insurance plan offered to the members of the Los Angeles County Medical Association ("LACMA"). Defendants are the Nettleship Company of Los Angeles ("Nettleship"), a broker for the program,[1] Pacific Indemnity Company ("Pacific Indemnity"), an

[1]Nettleship was an approved broker for the program during the period from 1944 until July 1, 1970. From 1957 to 1966, Cass & Johansing shared brokerage duties with Nettleship.

underwriter,[2] and four insurance carriers which reinsured portions of the total risk underwritten by Pacific Indemnity. Plaintiffs, doctors who purchased malpractice insurance under this group plan, claim the plan violates §§ 1 and 2 of the Sherman Act.

The complaint alleges that the Defendants, along with LACMA, combined and conspired to monopolize, restrain trade, fix prices, and suppress competition in the business of insurance in Los Angeles. It also alleges that the Defendants engaged in acts of boycott and coercion.[3]

Plaintiffs' claim that as a result of the Defendants' unlawful conduct, they have been compelled to pay more for medical malpractice insurance then they would have otherwise paid.

The case is before the Court on Defendants' motion for summary judgment. Defendants assert that the action is barred by the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, which exempts the business of insurance from federal antitrust laws to the extent that it is regulated by

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[2]Various insurance carriers underwrote the plan between 1944 and 1963. Pacific became the sole underwriter in 1963 of the Nettleship portion of the LACMA plan.

[3]Paragraph 16 of the Complaint alleges that Defendants

> "(a) suppressed competition in the medical malpractice insurance field by boycott and threat thereof, (b) fixed prices of such insurance at exorbitant levels, (c) coerced plaintiffs to purchase other types of insurance by virtue of defendants' monopolization of medical malpractice insurance commerce, (d) held meetings to advance their price-fixing schemes, (e) prepared false, misleading and untrue statistics to justify and legitimize their anti-competitive prices, and (f) by threat of cancellation, coerced and harassed physicians who have attempted to rectify defendants' predatory practices."

state law.[4] *Id.* § 1012(b). Plaintiffs contend that their action is not barred because the claimed unlawful conduct comes within the exception to the exemption, as provided in Section 3(b) of the Act, 15 U.S.C. § 1013(b):

> Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement, to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation.

The sole issue presented is whether any of the conduct challenged by this action constitutes boycott or coercion.

I. Procedural Background

This action was filed on November 13, 1969. Before the case was transferred to this Court, Judge Robert J. Kelleher made several rulings to set the stage for the motion now under consideration.

On September 1, 1970, Defendants moved for partial summary judgment on all claims except those based on allegations of boycott, coercion and intimidation. Judge Kelleher determined that the group malpractice insurance program organized by LACMA and the Defendants constituted the "business of insurance" within the meaning of the McCarran-Ferguson Act.[5] The Court also found that

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[4]Defendant reinsurers have joined in the motions brought by Pacific Indemnity and Nettleship but have also urged additional grounds for granting summary judgment in their favor. Noting that they have contracted only with the underwriter and not with the insureds, the reinsurers argue that they had no part in any of the alleged misconduct and that the insureds have no standing to sue them. In view of the disposition of the motion on other grounds, the Court need not reach these issues.

[5]Although the Order of August 2, 1971 does not explicitly find that the challenged insurance plan is within the "business of in-

the state of California comprehensively regulates the business of insurance. Applying the exemption "to the extent regulated by state law," Judge Kelleher concluded that in California, the business of insurance enjoys full exemption from federal antitrust scrutiny. On August 2, 1971, the Court granted Defendants' motion for partial summary judgment on all price-fixing issues. On June 9, 1975, the Defendants moved for summary judgment on the claims of boycott and coercion. The Court granted the motion on the authority of *Addrisi v. Equitable Life Assur. Soc.*, 503 F.2d 725 (9th Cir. 1974), *cert. denied* 420 U.S. 929 (1975), *reh. denied* 421 U.S. 922 (1975). *Addrisi* held that only members of the insurance industry have standing to sue under the boycott exception of the McCarran-Ferguson Act. Because this action was brought by policyholders, and not members of the insurance industry, the Court held that it was barred by the Act. Plaintiffs appealed.

During the pendency of the appeal in the Ninth Circuit, the Supreme Court decided *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 98 S.Ct. 2923 (1978), holding that policyholders can sue under the boycott exception. The Court of Appeals then remanded this case with instructions to determine whether the judgment could be predicated upon grounds other than *Addrisi*.

On remand, Defendants moved for reaffirmance of the judgment on the ground that Plaintiffs' case raised to triable issues of material fact. On March 28, 1980, Judge Kelleher found that the condition of the record was "disturbing" and "confused." The Court determined that the

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surance," the court must have found that it was; otherwise, it would not have applied the exemption to bar the price-fixing claims. *See* note 13 *infra*.

case "was not ripe for summary judgment" and declined to act on the motion. Instead, the Court vacated the judgment and ordered the parties to address four issues of fact distilled from the record:

(1) Whether Defendants suppressed by boycott or threat of boycott any independent insurance broker or carrier who attempted to provide competitive medical malpractice insurance to doctors;

(2) whether Defendants used coercion to prevent Plaintiffs from taking any action to remedy the anti-competitive nature of the market for medical malpractice insurance;

(3) whether Defendants agreed with state and county medical associations to condition availability of malpractice insurance upon a physician's continued payment of substantial dues, assessments, and fees to county and state medical associations, with such associations acting as the conduit for insurance exclusively sold by defendants;

(4) whether Defendants coerced Plaintiffs into the purchase of other types of insurance from Defendants as a condition precedent to the purchase of malpractice insurance from the Defendants.

In so defining the issues, Judge Kelleher expressly held that *St. Paul* did not affect his Order of August 2, 1971 that foreclosed consideration of claims of price-fixing in the business of insurance. Judge Kelleher found that *St. Paul* had not expanded "boycott" under the McCarran-Ferguson Act of include price-fixing, as Plaintiffs asserted. The Court relied on footnote 18 of *St. Paul*, in which the majority disavowed "the dissent's suggestion that [the terms 'boycott, coercion and intimidation'] are coextensive with the prohibitions of the Sherman Act." The majority added that

they were unaware of "any decision illustrating the assertion . . . that price-fixing, in the absence of any additional enforcement activity, has been treated either as 'a boycott' or 'coercion' " 438 U.S. at 545, 98 S.Ct. at 2932.

On August 15, 1980, Judge Kelleher entered summary judgment against the Plaintiffs on the issue of the alleged tying of coverage under the LACMA plan to other types of insurance sold by the Defendants.* On the other three issues, the Court denied summary judgment.

On November 3, 1980, the Court expressed its continued concern regarding the condition of the record and noted that the factual basis for the allegations of boycott and coercion remained uncertain. Therefore, the Court ordered Plaintiffs to submit a preview of their case-in-chief, correlating all items of evidence to the issues remaining in the case. The Court advised Plaintiffs that after this material was assembled, "it may very well be that the Court will permit the defendants to attack the sufficiency of the case you have made, even accepting . . . everything you have proffered . . . to be . . . true." Transcript of Nov. 3, 1980, p. 43.

Plaintiffs filed on January 12, 1981, a document entitled Plaintiffs' Further Submission Pursuant to Proceedings Held on November 3, 1980 re Hearing on Motion for Certification of this Action as a Class Action ("Plaintiffs' Further Submission"). The document includes summaries and excerpts of exhibits and summaries of expected testimony

*Judge Kelleher entered summary judgment because the Defendants showed there was no typing of insurance coverage. This Court notes as an additional ground that tying of insurance policies is part of the business of insurance and is not boycott or coercion.

of witnesses. The document fails, however, to correlate the evidence to the issues. Plaintiffs argued that they could not subdivide their proof because it must be viewed as a whole.

On March 13, 1981, Plaintiffs filed their Further Brief Re Motion for Class Certification Submitted Pursuant to Order of February 2, 1981, which also failed to correlate evidence with issues. Defendants responded by filing the present motion for summary judgment. On May 29, 1981, the case was transferred from Judge Kelleher to this Court.

Defendants' motion for summary judgment addresses the three issues upon which Judge Kelleher denied summary judgment in his August 15, 1980 order: boycott of competing brokers and carriers, coercion of policyholders to accept the LACMA plan, and the conditioning of LACMA coverage on LACMA membership. Plaintiffs argue that there are issues remaining in the case beyond those addressed by Defendants' motion and also ask this Court to reconsider issues Judge Kelleher has already decided.

Plaintiffs urge this Court to consider their price-fixing claim despite the previous judgment entered against them on that claim. Under Rule 60(b), judgments can be reopened upon a showing of mistake, fraud or newly discovered evidence. Plaintiffs have made no such showing. They merely ask this Court to reach a different result on the same arguments and record presented to Judge Kelleher. The determination whether a judge has erred as a matter of law is reserved for appeal. *E.g., Silk v. Sandoval*, 435 F.2d 1266, 1267-68 (1st Cir.), *cert. denied* 402 U.S. 1012 (1971). Therefore, the prior judgment on the price-fixing claim will not be reconsidered by this Court.

Plaintiffs also urge the Court to hear their claim of monopolization. Monopolization and attempt to monopolize

are included in the general allegations of ¶¶ 14 and 15 of the Complaint. Defendants maintain that Judge Kelleher entered judgment on the monopolization claim in 1971 and reaffirmed that judgment in 1977. The Defendants' view is supported by the omission of monopolization from the list of issues set out in the Order of March 28, 1980. However, monopolization is not explicitly addressed in either the 1971 Order or the 1977 Order of reaffirmance. In the 1971 Order, Judge Kelleher entered partial summary judgment on the ¶ 16 claims involving price-fixing and the "portions of paragraphs 14 and 15 related thereto." In the 1977 Order, Judge Kelleher reaffirmed his entry of judgment on price-fixing claims in light of *St. Paul*. Neither order mentions disposition of monopolization claim.

Plaintiffs now argue that the case they wish to present at trial is essentially a monopoly case, and that they should be allowed to do so because monopoly constitutes "boycott" or "coercion" within the meaning of the McCarran-Ferguson Act. Because the record leaves ambiguous the disposition of the monopolization claim, this Court will address that claim.

Plaintiffs urge this Court to reconsider Judge Kelleher's ruling that California's regulation of insurance is sufficient to trigger the McCarran-Ferguson exemption. Rulings that do not constitute judgments are binding throughout the litigation as the law of the case. *In re Staff Mortgage & Invest. Corp.*, 625 F.2d 281, 283 (9th Cir. 1980), *citing* 1B Moore's *Federal Practice* ¶. 401 (2d Ed. 1974). Although the law of the case is not an "inexorable command," prior rulings should be followed unless the evidence or controlling law has changed, or the decision is clearly erroneous. *White v. Murtha*, 377 F.2d 428 (5th Cir. 1967). Neither the evidence nor the law has changed since Judge Kelleher made

his initial ruling on August 2, 1971. The *St. Paul* case was decided after that order, but *St. Paul* did not address the operative McCarran-Ferguson language granting the exemption "to the extent regulated by state law." Judge Kelleher's ruling is by no means "clearly erroneous." In fact, it is clearly consonant with the law of the Ninth Circuit. After the 1971 ruling, the Court in *Addrisi* held that "the State of California has enacted laws extensively 'regulating the business of insurance'," thereby invoking the McCarran-Ferguson exemption. 503 F.2d at 728. This holding remains intact, because *St. Paul* overruled *Addrisi* only on the question of standing to sue for boycott, coercion and intimidation.

Judge Kelleher's ruling is further supported by the Plaintiffs' admission that the challenged practices are actionable under California law. In allowing the exemption to the extent regulated by state law, Congress chose not to honor purely "permissive" state legislation designed to preempt federal antitrust laws without substituting meaningful state regulation. *St. Paul,* 438 U.S. at 547, 98 S.Ct. at 2933. Because California law prohibits the kind of conduct Plaintiffs allege to have occurred, it cannot be deemed permissive or designed merely to thwart antitrust enforcement. Contrary to the Plaintiffs' position, prohibitory state legislation is sufficient to trigger the McCarran-Ferguson exemption. *E.g., Meicler v. Aetna Casualty & Surety Co.,* 506 F.2d 732, 734 (5th Cir. 1975). *See* Rosedeitcher, *Recent Judicial Interpretations of the McCarran Antitrust Exemption,* 13 Forum 873, 893 (1978).

Finally, in their statement of genuine issue filed April 13, 1981, Plaintiffs raise several new claims beyond those alleged in the complaint. Plaintiffs have offered no excuse

for raising these issues at the last minute, nor have they shown any basis in law or fact to support them.[7] Prolonging this already protracted litigation to develop these claims would work undue prejudice on the Defendants. For these reasons, the new matter introduced by the Plaintiffs' Statement of Genuine Issues shall not be considered by this Court.

When a plaintiff offers no justification for untimely introduction of new claims, and consideration of those

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[7]For example, Plaintiffs charge a boycott of doctors practicing "unaccepted therapies." But there is no evidence of such a boycott, nor any evidence that the Plaintiffs in this action were labelled by the Defendants as practicing "unaccepted therapies" or that they were denied coverage for any reason at any time other than failure to join LACMA.

Plaintiffs also allege agreements among Defendants and others to divide the insurance market. Plaintiffs claim that one Defendant and another insurance company agreed not to provide the same type of insurance coverage in competition with each other. However, Plaintiffs have not produced any evidence of that agreement. Moreover, a decision about what kind of coverage to offer customers, even when made in concert with a competitor, does not appear to constitute a boycott, although it might be an antitrust violation of some kind.

Plaintiffs further charge that Defendant, Pacific Indemnity, and a Northern California insurance carrier mutually agreed not to compete in each other's markets. Once again, no evidence was presented on this issue for the Court's review. Even Plaintiffs' description of the alleged agreement indicates that there is insufficient evidence to support a finding of boycott. Plaintiffs allege only that officials of the two companies communicated with each other on the subject of locations where the carriers would offer insurance, and that the carriers never competed. Thus, there is not sufficient evidence offered to even raise a triable issue of facts as to whether there was an agreement not to compete. Finally, like the market division based on type of coverage, a horizontal market division does not constitute a boycott.

claims would prejudice the defendant, refusal to allow the proposed claims is a proper exercise of discretion. *E.g.*, *Troxel Manufacturing Co. v. Schwinn Bicycle Co.*, 489 F.2d 968 (1973), *cert. denied* 416 U.S. 939 (1974).

II. Claims of Monopolization and Conditioning of Coverage on LACMA membership

The Defendants challenge to the monopolization claim is based on the allegations of the Complaint. Construed liberally, the Complaint alleges that the Defendants gained a monopoly position in the Los Angeles malpractice insurance market by illegal means and then charged monopoly prices to the Plaintiffs.

Defendants maintain that the facts pleaded in the Complaint establish the affirmative defense of the McCarran-Ferguson Act. When a complaint reveals facts constituting an affirmative defense to a particular claim, that claim should be dismissed. Wright & Miller, *Federal Practice & Procedure* § 1226 (1969 & Supp. 1982). Although such a defect is generally challenged on a motion to dismiss, it may be raised on a motion for summary judgment as well. *Id.*

Plaintiffs respond that the Complaint does not trigger the McCarran-Ferguson defense because monopolization constitutes "boycott" or "coercion" and therefore falls within the exception to the Act's exemption. At issue, is the scope of the statutory terms "boycott" and "coercion." The meaning of statutory terms is determined by the court as a matter of law. *Smith v. Califano*, 597 F.2d 152 (9th Cir.), *cert. denied* 444 U.S. 980 (1979). If "boycott" or "coercion" includes monopolization, then a claim for relief has been stated and Plaintiff may attempt to prove the

claim. If not, summary judgment will be entered against the Plaintiff on the claim of monopolization.

While the challenge of monopolization is based on the Complaint, the challenge to the claim regarding conditioning of coverage on LACMA membership is based entirely on undisputed facts. Defendants have admitted in their opposition to the motion all the facts Plaintiffs intended to prove.

Defendants admit that no physician could purchase LACMA coverage unless he joined LACMA and remained a member in good standing. They further admit that being a member in good standing required the payment of dues, and that the failure to pay dues would therefore lead ultimately to termination of coverage.

Because the relevant facts are undisputed, what remains is the determination whether the Defendants' conduct falls within the exception to the McCarran-Ferguson Act exemption. *See Smith*, 597 F.2d 152. Thus, the motion for summary judgment on conditioning of coverage on LACMA membership, like the motion challenging the monopolization claim, turns on the meaning of "boycott" and "coercion."

The definitions of those terms urged by the parties differ greatly. Plaintiffs define boycott as any "effective combination or agreement to carry out a program against the public interest" or any "regulation by private combinations and groups." Coercion is "conduct which constitutes the improper use of economic power to compel another to submit to the wishes of one who wields it." In essence, Plaintiffs argue that anything which violates

the policies of the Sherman Act is either boycott or coercion.[8]

Defendants define boycott as a "concerted refusal to deal on any terms." By "refusal to deal," they apparently mean a decision not to do business with a party that is motivated not by business considerations, but by an intent to injure that party. Defendants maintain that both "boycott" and "coercion" are more than the use of economic power to exact advantageous trade terms in a business deal. Although they do not specify, Defendants imply that the "coercion" label is reserved for outrageous tactics that threaten or violate independent legal rights such as privacy or property in order to gain economic advantage. Defendants contend that monopolization and conditioning of coverage on LACMA membership are merely the use of economic leverage to exact trade terms, not "boycott" or "coercion."

Both parties rely on the *St. Paul* case because it is the only Supreme Court interpretation of boycott and coercion under the McCarran-Ferguson Act. In *St. Paul*, the leading insurance carrier in the market obtained an agreement from its competitors that they would not deal with any of St. Paul's customers. The Defendant insurance carriers argued that the policyholders had no standing to sue for boycott under the McCarran-Ferguson Act. They rely on interpretations in the Fifth and Ninth Circuits that Congress intended the boycott exception to apply only to boycotts aimed at members of the insurance industry. *See Addrisi, supra; Meicler*, 506 F.2d 732, 734.

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[8]Plaintiffs' Further Brief Re Motion for Class Certification Submitted Pursuant to Order of February 2, 1981, at 38-41.

The Plaintiff policyholders relied on the interpretation of the First, Second, Fourth and D.C. Circuits to the contrary. *St. Paul*, 555 F.2d 3 (1st Cir. 1977); *Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co.*, 326 F.2d 841 846 (2d Cir. 1963) (dictum), *cert. denied* 376 U.S. 952 (1964); *Ballard v. Blue Shield of Southern W. Va., Inc.*, 543 F.2d 1075 (4th Cir. 1976), *cert. denied* 430 U.S. 922 (1977); *Proctor v. State Farm Mutual Auto. Ins. Co.*, 561 F.2d 262 (D.C. Cir. 1977).

The Supreme Court interpreted the legislative history of the McCarran-Ferguson Act and the traditional meaning of the word "boycott" to allow policyholders standing to invoke the exception. *St. Paul*, 438 U.S. at 551, 98 S.Ct. at 2935.

The McCarran-Ferguson Act was precipitated by the overruling of *Paul v. Virginia*, 75 U.S. (8 Wall) 183, 19 L.Ed. 357 (1869). In *Paul*, the Court held that insurance contracts were not "goods" or "commerce" under the Constitution. Eventually, *Paul* came to stand for the proposition that the business of insurance was exempt from federal regulation. Weller, *The McCarran-Ferguson Act's Antitrust Exemption for Insurance: Language, History and Policy*, 197 Duke L.J. 587-89 (1978).

In *United States v. South-Eastern Underwriters Association*, 322 U.S. 533, 64 S.Ct. 1167 (1944), the Court overruled *Paul*, holding that insurance transactions constituted "commerce" and, therefore, were included within the coverage of the Sherman Act. *South-Eastern Underwriters* caused serious concerns among members of the insurance industry and legislators that federal antitrust regulation would ruin the insurance industry. State regulation had

restricted competition among insurers because competition, it was thought, had led to instability and insolvencies. L. Lent, *McCarran-Ferguson in Perspective*, 1981 Insurance Counsel Journal 411, *citing* U.S. Dept. of Justice, *Federal-State Regulation of the Pricing and Marketing of Insurance* 5-8 (1977). There was also concern that the states' power to tax and regulate the insurance industry was jeopardized by the decision. *St. Paul*, 433 U.S. at 541, 98 S.Ct. at 2929.

With these concerns in mind, Congress exempted the insurance industry from federal regulation antitrust. By exempting "the business of insurance to the extent regulated by state law," Congress gave the states the power to preempt federal regulation. *See id.* at 541, 98 S.Ct. at 2929. Congress refused to extend the states' power of preemption to acts of boycott, coercion and intimidation. *See* § 3(b) of the Act.

The § 3(b) exception was apparently precipitated by the Congress' desire to federally police the type of conduct challenged in *South-Eastern Underwriters. St. Paul*, 438 at 546; 98 S.Ct. at 2932. The complaint in that case, alleged that an association of insurance brokers "blacklisted" members of the industry who would not accept the association's anti-competitive rules. Members of the association agreed to boycott any insurance companies or customers who dealt with recalcitrant brokers. This secondary boycott was designed to drive customers away from the blacklisted brokers and thereby punish them for breaking the association's rules. *South-Eastern Underwriters*, 322 U.S. at 535-36; 64 S.Ct. at 1164.

Because *South-Eastern Underwriters* was the paradigm Congress had in mind while drafting the exception, the Fifth and Ninth Circuits limited the exception closely to the facts of that case. These courts took the position argued by Justice Stewart in his *St. Paul* dissent that the exception "is most fairly read as referring to the . . . attempts by members of the insurance business to force other members to follow the industry's private rules and practices." Under this view, policyholders could not invoke the exception to sue for boycotts directed at them. 438 U.S. at 565; 98 S.Ct. at 2942.

The *St. Paul* majority rejected this limitation because there was nothing on the face of the statute, nor any compelling evidence extrinsic to the statute, so narrowly limiting the scope of the exception. The Court relied on the rule that the plain meaning of a statute should be followed as long as the "legislative materials of a statute do not demonstrate with necessary clarity 'that [Congress] has in fact used a private code, so that what appears to be violence to language is merely respect to special usage,' " 438 U.S. at 550 n.23; 98 S.Ct. at 2934 n.23, *citing* Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 543-44 (1947).

When Congress, after reviewing the *South-Eastern Underwriters* case, selected only the words boycott, coercion, and intimidation and no others, it apparently chose not to limit the exception precisely to the facts of that case. *See Proctor v. State Farm Automobile Ins. Co.*, 561 F.2d 262, 274 (D.C. Cir. 1977). Congress declined to codify the *South-Eastern Underwriters* facts in two important respects. First, it made no reference to disputes between industry competitors as opposed to disputes between insur-

ance providers and consumers. Second, it did not refer to the use of the boycott, coercion or intimidation to enforce pre-existing anti-competitive agreements among members of the industry. By addressing only the methods of enforcement used in *South-Eastern Underwriters*, and not limiting them to the context of enforcing intra-industry rules, Congress adopted the plain meaning of the words it used. *See St. Paul*, 438 U.S. at 549 n.22; 98 S.Ct. at 2934 n.22.

To define this plain meaning, the Court looked to the "tradition of meaning . . . elaborated in the body of decisions interpreting the Sherman Act" as well as the origin and development of the term in the labor context. *Id.* at 541-42; 98 S.Ct. at 2929-3. After canvassing the case law, the Court concluded that the common legal definition of "boycott" did not support its limitation to disputes between competitors. The Court noted authority for the proposition that only boycotts targeting competitors are illegal per se, but found this authority inapposite. The question before the Court was not which boycotts are illegal per se but rather what are boycotts. Id. at 542-43; 98 S.Ct. at 2930-31.

The Court's holding that the boycott exception should be interpreted by reference to the "tradition of meaning" developed under the Sherman Act has been taken by the Plaintiffs to mean virtually the entire Sherman Act is included within the exception.

They argue that once "boycott" and "coercion' are expanded beyond the facts of *South-Eastern Underwriters*, the terms are flexible enough to prohibit all anti-competitive practices. Furthermore, they argue that the purpose of the exception to the insurance exemption was to protect the public from any purely private regulation of the insurance business.

Anticipating such an interpretation in his dissent, Justice Stewart predicted that if " 'boycott' is to be given the same scope it has in Sherman Act case law, . . . that reading of § 3(b) would plainly devour the broad antitrust immunity bestowed by § 2(b)." *St. Paul*, 438 U.S. at 559; 98 S.Ct. at 2923. Justice Stewart argued:

> Most practices condemned by the Sherman Act can be cast as an act or agreement of "boycott, coercion or intimidation." For example, price fixing can be seen either as a refusal to deal except at a uniform price (*i.e.*, a boycott), or as an arrangement agreement to force buyers to accept an offer on the sellers' common terms (*i.e.*, coercion).

Id. n.6.

However, it is clear that the majority did not bring the entire Sherman Act within the exception. The rejection of a dispute between members of the insurance industry or between competitors in general as an essential element of a McCarran-Ferguson boycott did not eliminate the traditional elements of boycott. The majority defined the "generic concept of boycott" as "a method of pressurring a party with whom one has a dispute by withholding, or enlisting others to withhold, patronage or services from the target." 438 U.S. at 541, 98 S.Ct. at 2930. In applying the term "boycott" to the *St. Paul* agreement, the Court emphasized that the essence of boycott is the denial of the opportunity to do business, and not the terms of dealing:

> The conduct in question accords with the common understanding of a boycott . . . As a means of ensuring policyholder submission to new, restrictive ground rules of coverage. St. Paul obtained the agreement of

> the other petitioners, strangers to the immediate dispute, to refuse to sell any insurance to its policyholders. "A valuable service germane to [respondents'] business and important to their effective competition with others was withheld from them by collective action." *Silver v. New York Stock Exchange*, 373 U.S. 341, 348-349 n.5, 83 S.Ct. 1246, 1252, 10 L.Ed.2d 389 (1963).

Id. at 552-53; 98 S.Ct. at 2935-36.

The mere possibility that an artful pleader can cast almost any antitrust violation as boycott, coercion or intimidation does not transform those violations. As the majority noted, describing price-fixing as a refusal to deal except at a certain price does not make it a boycott or coercion.[9] *Id.* at 545 n.18; 93 S.Ct. at 2932 n.18. Price-fixing is illegal under the Sherman Act, but not because it is boycott or coercion.[10]

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[9]This is not to say that a refusal to deal except on certain terms can never constitute boycott. For instance, a group decision to sell at unfavorable prices to cerain buyers is a boycott. *See, e.g., Clor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S.Ct. 705 (1959). Such a boycott involves the key element of discrimination. The differentiation of the terms imposed puts upon the boycotted individual the kind of competitive disadvantage, albeit possibly to a lesser degree, created by an absolute boycott.

In the instant case, there is no discrimination or blacklisting. All who sought LACMA coverage were required to join LACMA. Furthermore, Plaintiffs allege no discrimination among doctors applying for LACMA membership.

[10]Prior to *St. Paul*, the District of Columbia Circuit made the same distinction between price-fixing and boycott or coercion under the McCarran-Ferguson Act. *Proctor v. State Farm Mutual Automobile Insurance Co.*, 561 F.2d 282, 274 (D.C. Cir. 1977). The Court said that the "contention that the insurance companies en-

Because price is merely one of many trade terms, the majority's statement that price-fixing is not a boycott or coercion implies that the concerted fixing of other trade

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tered into a horizontal agreement to pay or reimburse insureds according to a common formula based on the prevailing labor rate would not, as such, state a claim under the boycott provision, even though such an agreement could perhaps be characterized as a collective refusal to deal except at the prevailing rate." *Id.* at 274. *Accord, Meichler v. Aetna Casualty & Sur. Co.*, 506 F.2d 732 (5th Cir. 1975).

This holding is supported by the use of the term boycott in the *South-Eastern Underwriters* case, which prompted the boycott exception. "[T]he Supreme Court's opinion in *South-Eastern Underwriters* did not characterize the basic rate-fixing agreement in that case in terms of 'boycott, coercion or intimidation'; those terms were preserved for the additional activities utilized to enforce the agreement." *Proctor*, 561 F.2d at 274.

In *California League of Independent Insurance Producers v. Aetna Casualty & Surety Co.*, 179 F. Supp. 65 (N.D. Cal. 1959), *supplementing* 175 F. Supp. 857 (N.D. Cal. 1959), the court took the opposite approach, holding that an insurers' agreement fixing commission rates paid to brokers constituted "boycott" or "coercion." However, *California League* has been criticized as inconsistent with common meaning of the two terms:

> [T]he plaintiffs alleged that automobile insurers had conspired to decrease the commissions they paid to insurance agents and that they had persuaded other companies to refuse to do business with the plaintiff agents except at those agreed rates. . . .
>
> . . . Apart from the plaintiff's invocation of the magic phraseology, one gets no sense of what, if anything, the defendants did other than to live up to their agreements and to secure adherence to the agreement by other companies. The case was not one in which the conspirators had some grievance against the plaintiffs and then resorted to the forbidden weapons of boycott, coercion or intimidation in that dispute. The defendants were not alleged to have policed members of the combination in order to assure compliance with the agreement; nor did they attempt to bring third parties such as policyholders into the dispute. In fact, the insurers did not have any "dispute" with the agents; they simply didn't want to pay high commissions. Plaintiffs were "coerced" only in the sense that

terms does not constitute boycott or coercion either. They explicitly distinguished boycott from "a private agreement to fix rates and terms of coverage" because boycott pre-

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they were forced to endure the low commission rates to which the insurance had agreed. It is undeniable that these allegations were far less serious than those of *Barry*.

Gregory & Levin, *Boycotts and the McCarran-Ferguson Act: Some Observations About Barry*, 48 Antitrust L. J. 1087, 1100-01 (1978).

Since the *St. Paul* case, the distinction between "boycott" or "coercion" and price-fixing has been applied in cases in which insurance carriers have set the rates at which they would reimburse insureds for the costs of certain services. For example, in *Bartholomew v. Virginia Chiropractors Assoc.*, 612 F.2d 812 (4th Cir. 1979), *cert. denied* 446 U.S. 938 (1980), health insurance carriers employed a "peer review" system in which the state chiropractic association determined the rates at which carriers should reimburse insurers for chiropractors' services. Chiropractors who did not subscribe to the peer review system argued that the system constituted a boycott against them because its effect was to induce patients to use only chiropractors who subscribed to the system. The court held that there could be no boycott because, *inter alia*, the carriers did not refuse to reimburse insureds who used non-subscribing chiropractors. *Id.* at 817-18. *Accord, Pierno v. New York State Chiropractic Assoc.*, 650 F.2d 387 (2d Cir. 1981), *cert. granted* 102 S.Ct. 595 (1982); *Quality Auto Body Repair Inc. v. Allstate Insurance Co.*, 660 F.2d 1195 (7th Cir. 1981), *cert. den.* 102 S.Ct. 1717, (automobile insurance carriers set rates for cost of glass repair); *General Glass Co. v. Globe Glass & Trim Co.*, [1978-2] Trade Cas. (CCH) ¶ 62,231 (N.D. Ill. 1978) (same).

In contrast, the refusal to reimburse, at any price, for the services of certain doctors has been held a boycott. *Ballard v. Blue Shield of So. W. Va., Inc.*, 543 F.2d 1075 (4th Cir. 1977), *cert. denied* 430 U.S. 922 (1977).

Analyzing these cases, one commentator has noted, "[A]lthough section 3(b)'s boycott proviso was greately expanded in *St. Paul*, the subsequent cases have taken seriously the requirement that there be a concerted refusal to deal with the Plaintiff." Gregory, *Public Regulation of the Insurance Industry after Barry and Royal Drug: McCarran-Ferguson at the End of the Decade*, 16 Forum 371, 390 (1981).

cludes "the benefits of competition in vital matters such as claims policy and quality of service." *Id.* at 553; 98 S.Ct. at 2936.

The majority's distinction between the fixing of terms and boycott or coercion was offered only in dictum, but it is persuasive. As one commentator has explained:

> Competitors may be able to exact for themselves better trade terms by acting concertedly than they could obtain if they competed with each other. Such conduct is cartelization, a way of obtaining and exercising market power by concertedly exacting terms like those which a monopolist might exact. Members of a cartel . . . are not coercing anyone, at least in the usual sense of the word; they are merely saying "we will deal with you only on the following trade terms."
>
> Arrangements like those . . . are more like price-fixing agreements than they are like classic boycotts.

Sullivan, Antitrust Law 257 (1977). *Accord, Anglin v. Blue Shield,* 510 F. Supp. 75 (W.D. Va. 1981);[11] *St. Bernard*

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[11]In *Anglin,* Plaintiff wanted to purchase from his insurer, Blue Cross, coverage for himself and his dependent. However, Blue Cross offered only one family insurance plan, which included coverage for the subscriber, dependents and spouse. Plaintiff's spouse already had her own coverage, so Plaintiff had no use for the family package. When Blue Cross refused to underwrite a special family policy for only the Plaintiff and his dependent, Plaintiff brought an action for boycott and coercion. Applying *St. Paul,* the court held that Blue Cross' failure to offer coverage on Anglin's terms constituted neither a boycott nor coercion.

Gen'l Hosp., Inc. v. Serv. Ass'n. of N.O., Inc., 1978-1 Trade Cas. (CCH) ¶ 61,868 (E.D. La. 1977); *see* Levy, *Insurance —Is Anything Exempt Except Price-Fixing*?, 61 Chi. Bar Rec. 37 (1979); *Cf. Travelers Ins. Co. v. Blue Cross*, 481 F.2d 80, 84 (3rd Cir.) *cert. denied*, 414 U.S. 1093 (1973) (use of economic leverage to exact concessions from contracting parties is not "coercion").

The distinction between the fixing of terms and boycott or coercion is supported by the legislative history. Congress found that certain combinations, including rating bureaus whose effect was to fix prices, had "salutary" effects on the insurance industry. *St. Paul*, 438 U.S. at 548-49, 98 S.Ct. at 2933-34. At the time the statute was passed, many believed that the concerted fixing of terms might avoid ruinous competition. *See* Lent, *supra*. That such combinations might have salutary effects did not mean that Congress condoned all such combinations; rather, the potential for salutary effects made Congress willing to defer to state regulation on the subject.

By contrast, Congress saw nothing "salutary" in "boycott, coercion and intimidation," which were described as "oppressive" and "destructive" practices. *St. Paul*, 438 U.S. at 563, 98 S.Ct. at 2940 (Stewart, J., dissenting); *citing* 90 Cong. Rec. A4406 (1944). In fact, Congress' vehement disapproval of the "blacklisting" aspects of *South-Eastern Underwriters*, *see id.* at 546, 98 S.Ct. at 2932, indicated a concern with the discriminatory impact of these tactics. Mere agreements to fix terms of coverage, while they may cause economic injury, do so across the board. The distinguishing characteristics of a boycott are that it cuts off a buyer from a source of supply and thereby disadvantages

the buyer relative to others similarly situated but not subject to boycott.

Based on the foregoing analysis, this Court concludes that both the monopolization claim and the claim of conditioning of coverage on LACMA membership are barred by the McCarran-Ferguson Act. The conditioning of coverage on LACMA membership is no more than the concerted[12] fixing of a trade term.[13] Monopolization is merely the exercise by

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[12]One of the elements of a boycott is the concert of legally independent entities. *Card v. National Life Insurance Co.*, 603 F.2d 828 (10th Cir. 1979). The parties in this case apparently assume that the joint underwriting relationship shows sufficient concert among the Defendants to satisfy the requirement. Given the other dispositive issues in the case, the Court need not address this issue.

[13]Plaintiffs question the legitimacy of LACMA membership as a term of coverage. Although they apparently recognize that the LACMA membership requirement serves the purpose of defining the risk pool, Plaintiffs argue that virtually the same risk pool could be created by selling to all licensed physicians. Because LACMA membership is not necessary to create the desired risk pool, Plaintiffs argue that it is unreasonable for Defendants to force them to buy LACMA membership to gain insurance coverage. In essence, Plaintiffs' claim is that the LACMA membership-insurance coverage package is an illegal arrangement tying the sale of two distinct and separable products.

The Court need not determine whether there is a "tie" here. Even assuming Plaintiffs' characterization to be true, they have not made out either a "boycott" or "coercion." Tying is objectionable in the antitrust sense either because it is an abuse of monopoly power in the tying product or an attempt to monopolize the market in the tied product. Sullivan, *Antitrust* § 152 at 440 (1977); Nedrow, *The McCarran Controversy: Insurance and the Antitrust Laws*, 12 U. Conn. L. Rev. 205, 213-14. In this case, the tying product is the insurance coverage, and the tied product is association membership. Because there is no market in the tied product, association membership, to monopolize, the gravamen of the claim must be abuse of monopoly power.

From the standpoint of damage to the consumer, a tying arrangement is merely another form of extracting a higher price for the

a single entity, rather than a group, of the power to fix terms of dealing. *See* Sullivan, *supra*. Neither amount to boycott or coercion.

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tying product. A monopolist or price-fixer may decide to take his monopoly profit in the form of an extra sale of a second product rather than in the form of a higher price in the first product.

Therefore, like the price-fixing example cited in *Barry*, tying is not "boycott' or "coercion." *Accord, Anglin v. Blue Shield of Va.*, 510 F. Supp. 75 (W.D. Va. 1981) (alleged tying of insurance policies held not a boycott or coercion).

Plaintiffs have also questioned whether the determination to sell group policies only to LACMA members constitutes the "business of insurance" and is, therefore, exempted from plenary antitrust scrutiny by the McCarran-Ferguson Act. This issue was not addressed explicitly by Judge Kelleher in his Order of August 2, 1971 applying the "business of insurance exemption" to the facts of this case. However, the Court finds that the exemption applies.

In *SEC v. National Securities, Inc.*, 393 U.S. 453, 87 S.Ct. 564 (1969), the Court found that the term "business of insurance" focuses on the "relationship between the insurance company and the policyholder." In *Royal Drug Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 99 S.Ct. 1067 (1979), *reh. denied*, 441 U.S. 917 (1979), the Court noted that "a critical determinant in identifying insurance" is "the underwriting and spreading of risk."

The LACMA membership requirement constitutes the business of insurance because it determines the eligibility of a potential insured to contract with the insurance company, and in so doing creates the pool over which the risk is spread. Moreover, choice of a group membership pool gives the insurance company the advantage of an administrative apparatus, the association, to help create and maintain the relationship between insured and insurer.

Accord, Mathis v. Automobile Club Inter-Insurance Exch., 410 F. Supp. 1037 (W.D. Mo. 1976) (conditioning automobile insurance on membership in an automobile association held within the business of insurance).

Some alleged tying arrangements have been held extrinsic to the business of insurance. *See* 12 U. Conn. L. Rev. at 213-20. However, unlike this case, none of the cases so holding involved an allegedly "tied" product that also served as a term of coverage integral to the insurance contract.

III. Boycott and Coercion

In support of their motion for summary judgment on the issues of boycott and coercion, the Defendants have introduced declarations by their corporate officials describing the operation of LACMA insurance plan and stating that the Defendant corporations did not participate in any acts of boycott or coercion. Defendants have also relied on the deposition testimony of the Plaintiffs, who testified that they could not specify any acts of boycott or coercion within their personal knowledge. Finally, Defendants have introduced an exhibit setting forth purposes of the LACMA plan. Defendants contend that this evidence discharges their Rule 56(a) burden of showing that there is no trible issue of fact, thereby shifting the burden of showing a triable issue to the Plaintiffs, as provided in Rule 56(e).

Plaintiffs contend that Defendants' evidence is insufficient to carry their summary judgment burden because it does not set forth specific facts showing the absence of boycott and coercion. Plaintiffs are correct that, as a general rule, conclusory evidence is disregarded on a summary judgment motion. *See* 6 Moore's *Federal Practice* ¶ 52.22 [1] n.26 (1982).

However, the rule against consideration of conclusory statements is not absolute. *Waldie v. Schlesinger*, 509 F.2d 508, 510 (D.C. Cir. 1974) (Wright, J.). Lack of specificity may be tolerated if it is unavoidable. *E.g., Habib v. Raytheon*, 616 F.2d 1204 (2d Cir. 1980).

The reason for ignoring a conclusory denial of specific factual charges is its ambiguity. The Court cannot tell whether the declarant is denying the underlying facts or merely the legal or factual conclusions to be drawn from

those facts. *See Waldie*, 509 F.2d at 510. In the instant case, however, the ambiguity is not created by the denial. In their pleadings and briefs, Plaintiffs have failed to set out any specific facts allegedly constituting boycott and coercion, as opposed to monopoly or price-fixing. Furthermore, Plaintiffs have failed to comply with Judge Kelleher's order to point out in the vast record the evidence which pertains to boycott and coercion.

Under the circumstances, it was impossible for Defendants to make specific denials. They had no choice but to deny the Plaintiffs' allegations in the same fashion in which they were made. Because the Plaintiffs have made specific denials impossible, they should not be allowed to avoid summary judgment merely by objecting to the Defendants' evidence. The complete and unambiguous denial of a claim shifts the burden to the Plaintiff to show a triable issue of fact.[14] *See Scranton Const. Co., Inc. v. Litton Industries Leas. Corp.*, 494 F.2d 778 (5th Cir. 1974); *Natrona Service Inc. v. Continental Oil Co.*, 435 F. Supp. 99 (D. Wyo. 1977).

To discharge this burden, the Plaintiffs have relied on their Further Submission. Therefore, the issue is whether

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[14]The shifting of the burden is made even more appropriate by the Defendants' showing of a purpose for the LACMA program inconsistent with a finding of intent to boycott. For example, an article in the LACMA Medical Bulletin says that "the distribution of our buying power through and among numerous agencies has proved unsatisfactory . . . . The solution of the problem would appear to be the assumption of a relationship between the Association and one agency, solely and exclusively endorsed as its approved malpractice carrier . . . . in return for certain concessions."

The article also shows that Nettleship approval was not required as precondition to the purchase of malpractice insurance from other programs.

any of the evidence in the Further Submission raises a triable issue of fact.

A defendant moving for summary judgment "can obtain a preview of his opponent's evidence . . . and contend, in support of his motion, that the evidence is insufficient to discharge the opponent's production burden [at trial]. If his contention is correct, he discharges his own burden and shifts to the opposing party the onus of producing additional evidence or excusing his failure to do so under Rule 56(f)." Louis, *Federal Summary Judgment Doctrine: A Critical Analysis*, 83 Yale L.J. 745, 750 (1974); *Burke v. Gateway Clipper, Inc.*, 441 F.2d 946, 948 (3d Cir. 1971); *Avery v. Norfolk & Western R.R.*, 52 F.R.D. 356, 359 (N.D. Ohio 1971). *Accord, Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 513 F. Supp. 1100, 1133 n.40 (E.D. Pa. 1981).

Defendants have employed this method in addition to reliance on their own evidence. They have stipulated to the truth of all the evidence in Plaintiffs' Further Submission, which Plaintiffs have submitted as a valid representation of the case they intend to prove at trial. The stipulation is only for the purpose of this motion; if the motion is denied, the facts will once again be in dispute. Nonetheless, in deciding the motion, the Court must consider these facts established. *See Begnand v. White*, 170 F.2d 323, 327 (6th Cir. 1948); 6 Moore's *Federal Practice* ¶ 56.12 at 337-38 (1982). By agreeing *arguendo* to the Plaintiffs' evidence, Defendants have eliminated the factual issues from the motion, and left the Court to determine whether Plaintiffs' evidence is legally sufficient to support a recovery. In essence, the issue is whether the evidence amassed for trial shows that the Plaintiffs might survive a motion for directed verdict. If the Plaintiffs have no reasonable poten-

tial for surviving a directed verdict, then summary judgment should be entered against them. *Dyer v. MacDougall*, 201 F.2d 265, 268 (2d Cir. 1952) (L. Hand, J.); Louis, *supra; see Proctor*, 561 F.2d at 262, 275 (to defeat a well-supported summary judgment motion, Plaintiff must produce "significant evidence substantiating the theory of the complaint").

Plaintiffs claim that the Defendants boycotted rival insurance brokers and carriers. A boycott of competitors is accomplished by inducing third parties to forego doing business with competitors. *See* Sullivan, *Antitrust Law* § 229 at 230 (1977). Plaintiffs' theory is apparently that the Defendants induced LACMA or LACMA members to refuse to deal with its competitors. Thus, Plaintiffs have alleged a secondary boycott, such as the one in *South-Eastern Underwriters*, rather than a primary boycott, or direct refusal to deal, as in *St. Paul*.

The record shows that, at certain times, the Defendants were the only brokers and carriers to underwrite and sell the official LACMA plan. The record also shows that, after creating the plan with LACMA, the Defendants were able to sell policies to the vast majority of doctors in the market. The Defendants attained and maintained their status as providers of the official plan, as well as their large market share, by arguing to LACMA and LACMA members that their program offered greater advantages to the physicians than the alternative programs that were suggested or offered by other insurance providers.[12]

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[12]The Court finds that there were competing insurance plans available. However, this finding is not necessary to support summary judgment. Even if absolute monopoly were obtained, the lack of competition would not support an inference of boycott. Plain-

Although LACMA supported its own plan by urging its merits to LACMA members, the organization did not require its members to purchase coverage under the plan or penalize members for purchasing insurance elsewhere.

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tiffs' own evidence supports another inference—that competing carriers failed because LACMA affiliation brought so many doctors into the LACMA program. A report to LACMA by a member of the association submitted into evidence by the Plaintiffs, states:

> In the first instance, malpractice insurance is unlike other insurance. Other group insurance can be used as a basis for planning or as a supplement. In other words, many physicians purchase more than one health insurance policy or more than one disability insurance policy, and if the group plan is not to his liking, he can purchase whatever he desires on the open market. The complete opposite obtains with professional liability insurance. The physician never purchases two policies. From this it follows that once a society gets in bed with a single carrier one of two things must occur and both are bad. The first is that the society will succeed in delivering 100% of the members to the endorsed carrier, thus endorsing a monopoly with all its attendant dangers to the membership. Or, it will not succeed and will deliver numbers less than 100%. The result of this is only that the endorsed group carrier is then subject to adverse selection by a competing independent carrier. And as rates continue to climb, increased adverse selection can be anticipated, guaranteeing further rate increases by the endorsed carrier. And so the cycle continues; as it has and is at the present moment.

Plaintiffs' Further Submission, p. 301-02.

Another physician critical of the LACMA plan wrote a letter to the association containing this observation: "Other competing companies have been driven out of the local market because of the poor-risk coverage that they were forced to write. This left Nettleship and its carriers with a monopoly situation." Plaintiffs' Further Submission p. 164.

The apparent intention of LACMA in creating the plan was to consolidate its buying power in the hope that a united front would provide greater control over medical malpractice insurance rates. The plan seems to have backfired.

None of the evidence supports the theory that Defendants induced either LACMA or its members to refuse to deal with competitors. Rather, the Defendants obtained the approval of LACMA and the business of most of its members by promoting the superiority of their program. Such competitive conduct does not constitute inducing the refusal to deal with competitors. To boycott a competitor, a trader must do more than triumph in competition for a potential customer; he must destroy his rival's opportunity to compete for that customer. He must prevent the customer, either through force or persuasion, from even considering his competitor's entreaties to do business. *See Transnational Ins. Co. v. Rosenlund*, 261 F. Supp. 12, 27 (D.C. Ore. 1966) ("the word 'boycott' [in the McCarran Act] implies an urging or agreement with another person to desist from doing business with another. The word does not apply when persons are urged to do business with another"); Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. of Pa. L. Rev. 847, 876-77 (1955); Von Kalinowski, *Antitrust Laws and Trade Regulation* § 1.03[4] (b) iv (1982).

For example, in *South-Eastern Underwriters*, the brokers' association forced potential customers to forego business dealings with blacklisted brokers by threatening never to deal with customers who patronized the blacklisted brokers. Although *St. Paul* involved a primary boycott, the Court emphasized the element of purpose to put economic pressure on the boycotted party by cutting off opportunities to trade.

In contrast, the mere termination of one of two distributors by a group of liquor wholesalers was not a boycott, because there was no showing of purpose to exclude the terminated distributor from competition altogether. *See*

Joseph Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 76-77 (9th Cir. 1969), *cert. denied* 396 U.S. 1062 (1970). For the same reason, an exclusive agency relationship between a broker and an insurance carrier was not a boycott of rival brokers. *Owens v. Aetna Life & Casualty Co.*, 654 F.2d 218 (3d Cir.), *cert. denied* 102 S.Ct. 657 (1981).

Because the Plantiffs have failed to make any showing of intent on the part of the Defendants, LACMA or LACMA members, either to refuse to deal or to induce a refusal to deal with the Defendants' competitors, their evidence fails to raise a triable issue of boycott.[16]

Plaintiffs also claim that the Defendants employed coercion to prevent physicians from correcting the anti-competitive nature of market. Plaintiffs apparently rely on the same evidence to support coercion that they introduced on the boycott issue. This change of labels does not

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[16]To support the boycott of brokers theory, Plaintiffs have noted that at least one broker, Cass & Johansing, left the program. However, the mere termination of an insurance agent does not constitute boycott or coercion, *Card v. Nat'l Life Insurance Co.*, 603 F.2d 828 (10th Cir. 1979), and there is no evidence suggesting that any broker was driven out of the program.

Plaintiffs also note that when Cass & Johansing left the program, Nettleship offered to cover the administrative expenses formerly paid by Cass & Johansing if Nettleship became the exclusive broker. Plaintiff characterizes this as an attempt to "buy" the exclusive brokerage arrangement. Despite Plaintiffs' inventive characterization, this evidence does not tend to show a boycott of rival brokers. Even if the money in question were a bribe, it would demonstrate an intent on the part of LACMA to enrich its coffers rather than an attempt to injure other brokers. Rival brokers might have an action for unfair competition, but not for boycott. *See* Gregory & Levin, *supra* at 1099-1100.

aid them. "Practices for which 'persuasion,' 'exposition' or 'argument' are fair characterizations" do not constitute "coercion." Barber, *supra*, n.1, quoting *Ford Motor Co. v. United States*, 335 U.S. 303, 317-18 (1948). There is no evidence that the Defendants engaged in acts that could not be characterized reasonably as argument, exposition or persuasion.[17]

IV. Conclusion

For the foregoing reasons, IT IS HEREBY ORDERED that summary judgment should be entered[18] against the

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[17]In the Further Submission, Plaintiffs' counsel state that when LACMA officials waivered in their support of the group plan, the Defendants responded by threatening to drop the membership requirement, discontinue financial support and cancel insurance policies issued to Directors of LACMA. The Further Submission contains no evidence to support these allegations, nor any evidence that these actions would not have been within Defendants' contractual rights. Threats to enforce legal rights under a contract do not amount to coercion. *Blackley v. Farmer's Ins. Group, Inc.*, 1976-2 Trade Cas. (CCH) ¶ 61,061 (D. Utah 1976).

Most importantly, there is no indication that these alleged actions had any impact on the Plaintiffs or other doctors. According to the statement of counsel in the Further Submission, these "coercion" acts were employed to force LACMA to "discourage" doctors from leaving the program. Mere "discouragement" is not coercion.

[18]Plaintiffs have argued that the Court may not grant summary judgment here because it is disfavored in antitrust cases. In *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S.Ct. 486 (1962), the Court held that:

> summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury.

The Ninth Circuit has noted that, "the often cited Poller case . . . has become a magic wand waved indiscriminately by those

Plaintiffs on all claims remaining in this case.

DATED: June 28, 1982

/s/ WM. MATTHEW BYRNE, JR.
Wm. Matthew Byrne, Jr.
United States District Judge

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opposing summary judgment in antitrust actions." *Mutual Fund Investors, Inc.* v. *Putnam Management Co.*, 553 F.2d 620 (9th Cir. 1977). Most courts and commentators recognize that in warning against resolution of issues of fact regarding state of mind, the court did not intend to differentiate antitrust cases. Wright, Miller & Cooper § 2730 at 599; P. Areeda & D. Turner, *Antitrust Law* ¶ 316B (1978) The Supreme Court appears to have accepted the view that Rule 56 is applied no differently in antitrust cases. In *First Nat. Bank v. Cities Service Co.*, 391 U.S. 253, 290; 88 S.Ct. 1575, 1593 (1968), the Supreme Court, affirming a grant of summary judgment, refused to place a lesser burden on the non-moving party simply because the motion was made in an antitrust case.

For these reasons, this Court has applied regular summary judgment procedures to this case, and in so doing, has been careful to give the Plaintiffs the benefit of any reasonable inferences suggested by their evidence.

Appendix F

Excerpts from Transcript of Hearing on Motions for Summary Judgment—November 5, 1981

"(The Court) Let me ask you (Pacific Indemnity) at this point: You say that there is no evidence that has been put forward by the plaintiffs to support the claim. Now, the moving parties, in their affidavits—perhaps of necessity, but do in fact rely in great part upon conclusions—that 'we didn't do that, and we didn't do that.' The plaintiffs then come back with more specific factual presentations. Is it your position that this motion for summary judgment should be decided on the premise that the facts that the plaintiffs present are true?

"(Mr. Westbrook) Yes, I don't think—I mean I don't really have any problem with that. I don't think it is a question of burden of proof or credibility or anything of that sort, Your Honor.

"(The Court) Then, it is not a question of a triable issue of fact, because, in effect, you are saying, then, everything they set forth in their affidavits is correct.

"(Mr. Westbrook) Well, I don't recall much in the way of affidavits, but mostly documents and deposition testimony.

"(The Court) I will put it this way. All of their evidentiary presentation is correct.

"(Mr. Westbrook) We are not arguing that the Court should not accord whatever evidence they can point to, that bears on these specific issues, full credibility. No, Your Honor, we are not. In other words, yes, you may take it as true.

"(The Court) Well, so that the Court of Appeals, some day, if they have this before them, can have an understanding that it is almost like a trial on stipulated facts, so they won't have to search for triable issues of fact?

"(Mr. Westbrook) I think that's correct, Your Honor.

• • •

"(Mr. Bevan) Bruce Bevan for Musick, Peeler & Garrett, on behalf of Sentry Insurance. . . .

"Since everybody has agreed with Mr. Westbrook, I think I will start off by disagreeing in a slight respect with his answer to the Court's question about whether we assume that the plaintiff's declarations are accurate. "Sentry Insurance assumes that for the purpose of our summary judgment motions we have had to do that, because if we contested their affidavits, obviously, there would be an issue of fact raised in our motion and our motions should be denied as a result.

• • •

"(Mr. Appel) The issues, Your Honor, and I am — I thought that the matter was before the Court on whether there were questions of fact, genuine issues of material fact—

"(The Court) Apparently not.

"(Mr. Appel) This morning, as I understand it, defendants, for purposes of this motion at any rate, or their various motions, tell the Court that the Court may assume that the matters recited by plaintiffs in the opposition papers may be taken as true—

"(The Court) No.

"(Mr. Appel)—and also tell the Court—

"(The Court) No. Not in the opposition papers; in the evidentiary presentations.

"(Mr. Appel) The evidentiary presentation. I am not talking about the arguments of counsel, Your Honor.

"(The Court) Okay.

"(Mr. Appel) I am talking specifically about the January 13, 1981, further submission, which is, for the record—

"(The Court) Are you going to give me the weight or pages?

"(Mr. Appel) Pages. — A 414 page document which includes references to exhibits, excerpts from exhibits, excerpts from depositions, depositions on file with the Court which are designated, and it also includes the substance of deposition testimony and the expected testimony of certain witnesses.

"This is the document (indicating) which defendants, for purposes of these motions, at least, assume to be true. So I will not further address that point.

"Then, Your Honor, they say, as I understand it, that, as a matter of law, not withstanding the truth and accuracy of all those facts, they are entitled to summary judgment because of the application of the McCarran Act.

"On that point, Your Honor, counsel began with a recitation from the St. Paul case, and I think the St. Paul case—

"(The Court) Let me ask. Let me ask Mr. Westbrook since he is the senior statesman, anyway.

"Is that your position?

"(Mr. Westbrook) I am not sure I understand counsel's statement.

"(The Court) Read back what Mr. Appel said. (The Record was read.)

"(The Court) Is that your position?

"(Mr. Westbrook) That's correct, Your Honor."

"So I can clarify this to the extent that there is evidentiary matter in the record propounded by plaintiffs, and I take that to be the further submission, and putting aside such editorial comment that is in there, we do not contest that evidence." (*Hearing*, 11/5/81, *TR.* pp. 15-18, 45-46, 52-54).

Appendix G

United States District Court

Central District of California

Civil Minutes—General

CV 69-2301-RJK Date: 8/11/80

Feinstein et al. V. Nettleship et al.

Entry

[Entered Aug. 15, 1980]

Present:

Hon. Robert J. Kelleher, Judge

James H. Haggard

Deputy Clerk

N/A

Court Reporter

Attorneys Present For Plaintiffs:

N/A

Attorneys Present For Defendants:

N/A

Proceedings: Minute Order

The matter having come before the Court and having been taken under submission, and the Court having considered the record and being fully advised, and good cause appearing therefor, hereby ORDERS that defendants' motion for re-affirmance of summary judgment is DENIED, except as to the following issue: "Whether defendants coerced plaintiffs into the purchase of other types of insurance from defendants as a condition precedent to the purchase of medical malpractice insurance from defendants."

As to this latter issue, defendants offer the affidavit of John Allen, president of defendant Nettleship, which states that the plaintiffs—each of whom had purchased malpractice insurance through defendant Nettleship—never purchased any other type of insurance from Nettleship. Indeed, it is an explicit condition of the arrangement entered into in 1944 between the Los Angeles County Medical Association and Nettleship that members of the association not be forced to purchase other types of insurance from Nettleship as a condition of obtaining malpractice insurance from Nettleship. Plaintiffs have failed to offer any evidence which controverts that proffered by defendants. Indeed, plaintiffs have failed to point to *any* competent evidence in the record in support of such an allegation. Accordingly, there being no genuine issue as to any material fact regarding this issue of tie-in sales, the Court finds that defendants are entitled to judgment as a matter of law with respect to such issue.

The Clerk shall mail a copy of this Order to counsel.

Appendix H

United States District Court
Central District of California

No. CV 69-2301-RJK

Walter Feinstein, Jason I. Green, Jack Kriegsman,
Leo Miller, and Morton H. Pastor,
Plaintiffs,

v.

Nettleship Company of Los Angeles,
Pacific Indemnity Company,
Insurance Company of North America,
Hardware Mutual Casualty Company,
American Re-Insurance Company, and
North American Re-Insurance Corporation,
Defendants.

MEMORANDUM OF DECISION AND ORDER

[Filed March 28, 1980]

This action is here on remand from the Ninth Circuit Court of Appeals by Order filed November 7, 1979. Pursuant to the Order of Remand, the Court hereby vacates its entry on August 31, 1977 of partial summary judgment in favor of defendants as to plaintiffs' claims that: (1) defendants suppressed by boycott or threat of boycott any independent insurance broker or carrier who attempted to provide competitive medical malpractice insurance to doctors; (2) defendants intimidated and coerced plaintiff physicians to purchase other types of insurance coverage

from defendants as a condition precedent to the purchase of medical malpractice insurance from defendants; and (3) defendants attempted to coerce, harass, and otherwise prevent any doctor from taking any "affirmative action" to rectify the anti-competitive nature of the market for medical malpractice insurance by threatening cancellation of said doctors' malpractice insurance or by charging higher insurance premiums to said doctors.

As originally filed, this action raised claims under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Plaintiffs, a group of physicians asserting individual claims and claims on behalf of other physicians similarly situated, alleged that defendants, brokers and carriers of medical malpractice insurance, combined and conspired to monopolize, monopolized, and attempted to monopolize the medical malpractice insurance business in California. The complaint further alleged that defendants also combined and conspired to restrain trade in the sale, brokerage, and underwriting of medical malpractice insurance.

Defendants were charged with six specific courses of conduct undertaken in furtherance of their conspiracy to monopolize and to restrain trade, their attempt to monopolize, and their exercise of monopoly power. Defendants were alleged to have:

> (a) suppressed by boycott or threat of boycott any independent insurance broker or carrier who attempted to provide competitive medical malpractice insurance to doctors;
>
> (b) fixed the price of medical malpractice insurance to doctors at exorbitant prices;
>
> (c) intimidated, threatened, and coerced doctors to purchase all other necessary types of insurance cover-

age from defendants and co-conspirators as a condition precedent to the issuance of medical malpractice insurance to these doctors;

(d) had meetings with co-conspirators to set high, non-competitive premium rates for medical malpractice insurance;

(e) met and prepared biased, false, and misleading statistical tabulations and other publications regarding defendants' and co-conspirators' financial position and market trends in an effort to justify their anti-competitive prices;

(f) attempted to coerce, harass, and otherwise prevent any doctor from taking any "affirmative action" to rectify this anti-competitive market situation by threatening cancellation of said doctors' medical malpractice insurance or by charging higher insurance premiums to said doctors.

As to allegations (b), (d), and (e) above, relating to pricing practices of defendants, on August 2, 1971 the Court granted partial summary judgment in favor of defendants on the ground that such antitrust claims, relating as they do to the insurance industry, were exempt from antitrust attack by reason of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011 *et seq.* The Court found that the claims in (b), (d), and (e) were matters relating to the business of insurance over which California had exercised its regulatory power, thereby bringing into play the exemption created by the McCarran-Ferguson Act. The August 2, 1971 Order was directed only to the price-fixing and related claims, and the action went forward on the remaining claims charging boycott, coercion, and intimidation.

Thereafter, defendants moved for summary judgment as to these remaining claims of boycott, coercion, and intimida-

tion. On August 31, 1977, the Court entered a Memorandum of Decision and Order granting summary judgment in favor of defendants as to these remaining claims. The Court relied upon *Addrisi v. Equitable Life Assurance Society of United States*, 503 F.2d 725 (9th Cir. 1974) which had considered the breadth of applicability of the McCarran-Ferguson Act insurance industry antitrust exemption to a situation allegedly involving coercion, intimidation, or a boycott. The McCarran-Ferguson Act exempts the insurance industry from the federal antitrust laws to the extent that such business to state regulation. 15 U.S.C. § 1012(b). Section 3(d) of the Act, 15 U.S.C. § 1013(b), however, provides a narrow exception to the antitrust exemption—one which is applicable to agreements to, or acts of, boycott, coercion, or intimidation. The exception to the exemption provides: "Nothing contained in this Chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or any act of boycott, coercion, or intimidation." 15 U.S.C. § 1013(b). In *Addrisi*, the Ninth Circuit specifically held that customers and policyholders of insurance companies had no standing to bring an action under § 1013(b); the Court noted that the exception to the exemption was intended to protect insurance agents from being coerced by insurance companies to refrain from dealing with blacklisted insurance companies or agents.

In the case at hand, this Court, in its August 24, 1977 opinion, found that plaintiffs did not fall within the class of persons who may sue under the boycott exception to the antitrust exemption. The Court characterized plaintiffs' boycott and coercion claims in the following fashion. First, the Court ruled that plaintiffs' allegation that defendants intimidated and coerced physicians to purchase other types

of insurance coverage from defendants as a condition precedent to the purchase of medical malpractice insurance did not fall within the exception to the antitrust exemption on the ground that the allegation relates to a wrong incurred by *puchasers* of insurance policies. Second, the allegation that physicians were coerced, harassed, and otherwise prevented from taking corrective action directed toward the various practices alleged in the complaint was held not to fall within the limited exception to the antitrust exemption, again on the ground § 1013(b) offers no protection to *policyholders*.

Plaintiffs appealed from both the 1971 and 1977 Orders granting summary judgment in favor of defendants regarding the price-fixing and boycott sets of claims respectively. On November 7, 1979, the Ninth Circuit filed the following Order of Remand:

> "The case is remanded to the district court for reconsideration for a period of ninety-one days. Remand is prompted by the intervening decision of *St. Paul Fire & Marine Insurance Co. v. Barry*, 434 U.S. 919, 98 S.Ct. 391 [should be: 98 S.Ct. 2923 (1978), 54 L.Ed. 275.]
>
> It is suggested that the district court lift its final judgment before reconsidering the case. It is observed that appellees maintain that the decision below may be sustained on other grounds than *Addrisi v. Equitable Life Assurance Society of the United States*, 503 F.2d 725 (9th Cir. 1974), overruled by *St. Paul Fire & Marine, supra*.
>
> On any appeal from a new final judgment, records and briefs from this case may be transferred on motion or stipulation to the new numbered appeal. The existing panel of this court is to have any new appeal concerning the case below."

On January 28, 1980, the Ninth Circuit filed an Order Extending Remand for a period of sixty-three days from the date of filing of the Order.

The Court notes that this vacation of its judgment entered August 31, 1977 in no way disturbs its entry on August 2, 1971 of partial summary judgment in favor of defendants as to plaintiffs' claims: that defendants fixed the price of medical malpractice insurance to doctors; that defendants had meetings with co-conspirators to set high, non-competitive premium rates for medical malpractice insurance; and that defendants met and prepared biased, false, and misleading statistical tabulations and publications regarding their financial position and market trends in an effort to justify their anti-competitive price levels. Despite plaintiffs' purported appeal from the August 2, 1971 judgment via the filing of a non-timely notice of appeal on September 28, 1977, the Court considers those issues decided therein as being finally determined and undisturbed by the Ninth Circuit's Order of Remand. The Order of Remand simply furnishes no basis for the conclusion that the matters resolved in the August 2, 1971 Order have now been thrown open for reconsideration. Furthermore, *St. Paul Fire & Marine Insurance Co. v. Barry*, 434 U.S. 919, 98 S.Ct. 2923 (1978), provides no ground upon which plaintiffs may renew their class of claims relating to price-fixing and monopolization.

In brief, *St. Paul Fire & Marine Insurance Co. v. Barry*, held that the term "boycott" within the meaning of the exception to the antitrust exemption in the McCarran-Ferguson Act is not limited to concerted activity against insurance companies or agents or, more generally, against

competitors of members of the boycotting group, but, instead, extends also to certain types of disputes between policyholders and insurers, 98 S.Ct. at 2935. Narrowly stated, the Court's holding was that the alleged activity whereby three insurers agreed not to deal on any terms with policyholders of a fourth insurer in order to compel those policyholders to accept reduced coverage under medical malpractice policies constituted a "boycott" within the meaning of the "boycott" exception to the McCarran-Ferguson Act—so that the complaint alleging such action stated a valid antitrust claim.

The following behavior by insurance companies was at issue in *St. Paul Fire & Marine Insurance Co.* The four insurance companies which controlled the relevant market for medical malpractice insurance in Rhode Island were alleged to have agreed that any three of the four would not deal on any terms with the policyholders of the fourth. Solely for the purpose of forcing physicians to accede to a substantial curtailment of the coverage previously available, St. Paul induced its competitors to refuse to deal on any terms with its customers. The Court noted that the agreement between the four insurance companies erected a barrier between St. Paul's customers and any alternative source of the desired malpractice insurance coverage, thereby effectively foreclosing all possibility of competition anywhere in the relevant market. The Court observed that: "This concerted refusal to deal went well beyond a private agreement to fix rates and terms of coverage, as it denied policyholders the benefits of competition in vital matters such as claims policy and quality of service. [citations omitted]. St. Paul's policyholders became the captives of their insurer." 98 S.Ct. at 2936.

Plaintiffs make the outlandish argument that *both* the 1971 Order (finding that plaintiffs' price-fixing claims were barred by the antitrust exemption) and the 1977 Order (relating to the boycott and coercion claims) have now been thrown open for reconsideration. Plaintiffs make all kinds of vague allegations that certain acts constituting boycotts or of an intimidating character were used to buttress the alleged conspiracy to monopolize and to restrain trade; plaintiffs also raise their monopoly and price-fixing claims anew. The *St. Paul Fire & Marine Insurance Co.* decision seems to plainly disavow plaintiffs' asserted broad reading of "boycott" and "coercion":

> "Whatever the precise reach of the terms 'boycott,' 'coercion,' and 'intimidation,' the decisions of this Court do not support the dissent's suggestion that they are coextensive with the prohibitions of the Sherman Act. [citations omitted] In this regard we are not cited to any decision illustrating the assertion. . . that price-fixing, in the absence of any additional enforcement activity, has been treated either as 'a boycott' or 'coercion.' " 98 S.Ct. at 2932, n. 18.

What therefore remain for consideration by the Court on remand here are those of plaintiffs' claims which were dealt with in this Court's Order of August 31, 1977. However, the condition of the record as to these issues is disturbing. On February 1, 1980 defendants moved for reaffirmance of summary judgment in their favor; however, such motion was unaccompanied by any affidavits or other proper kinds of factual material. Accordingly, on March 5, 1980, the Court ordered the parties to file affidavits showing what, if any, genuine issues exist as to material facts in this action. Upon consideration of the parties' submissions,

the Court notes that the supposed factual bases upon which the parties rely as to the remaining claims are presented in an incomplete, confused, and shoddy manner. The alternative ground for summary judgment which defendants apparently suggested to the Ninth Circuit—in addition to the statutory bar to plaintiffs' boycott and coercion claims—is the lack of any evidence to support such claims. However, because of the confused state of the record, the Court is unable to divine the factual basis for any such argument. Therefore, the Court finds that this matter is not ripe for summary judgment.

Each party must make a factual showing by specific reference to deposition testimony, answers to interrogatories and requests for admission, and affidavits directed to the specific issues of (1) whether defendants suppressed by boycott, or the threat of boycott, any competition from independent insurance brokers seeking to sell medical malpractice insurance; (2) whether defendants coerced plaintiffs into the purchase of other types of insurance from defendants as a condition precedent to the purchase of medical malpractice insurance from defendants; (3) whether defendants used coercion to prevent plaintiffs from taking any action to remedy the anti-competitive nature of the market for medical malpractice insurance; and (4) whether defendants agreed with state and county medical associations to condition the availability of medical malpractice insurance upon a physician's continued payment of substantial dues, assessments, and fees to county and state medical associations, with such associations acting as the conduit for insurance exclusively sold by defendants. Accordingly, the Court declines to act on defendants' motion for reaffirmance of summary judgment until the parties

provide the requisite factual showing discussed above. The parties are hereby ORDERED to make such a showing forthwith.

It appearing to the Court that, before this action returns to the Ninth Circuit, there ought to be substantial further work undertaken by counsel (which counsel seem loathe to do), the Court hereby requests the Ninth Circuit, upon receipt of this Order, to extend the period of remand for sixty days from the date of receipt.

The Clerk of the Court shall send, by United States mail, a copy of this Memorandum of Decision and Order to counsel for the parties.

DATED: March 28, 1980.

/s/ ROBERT J. KELLEHER
Robert J. Kelleher
United States District Judge

Appendix I

In the United States Court of Appeals
For the Ninth Circuit

No. 77-3998
DC No. CV 69-2301

Walter Feinstein, Jason I. Green, Jack Kriegsman,
Leo Miller and Morton H. Pastor,
Plaintiffs and Appellants,

vs.

Nettleship Company of Los Angeles, Pacific Indemnity Company, Insurance Company of North America, Hardware Mutual Casualty Company, American Re-Insurance Company and North American Re-Insurance Corporation,
Defendants and Appellees.

ORDER OF REMAND

[Filed Nov. 7, 1979]

Before: CHAMBERS, ANDERSON and SCHROEDER, Circuit Judges.

The case is remanded to the district court for reconsideration for a period of ninety-one days. Remand is prompted by the intervening decision of *St. Paul Fire & Marine Insurance Co. v. Barry*, 434 U.S. 919, 98 S.Ct. 391, 54 L.Ed. 2d 275.

It is suggested that the district court lift its final judgment before reconsidering the case. It is observed that appellees maintain that the decision below may be sustained

on other grounds than *Addrisi v. Equitable Life Assurance Society of the United States*, 503 F.2d 725 (9th Cir. 1974), overruled by *St. Paul Fire & Marine, supra*.

On any appeal from a new final judgment, records and briefs from this case may be transferred on motion or stipulation to the new numbered appeal. The existing panel of this court is to have any new appeal concerning the case below.

Appendix J

Alioto & Alioto
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Attorneys for Plaintiffs

United States District Court
Central District of California
No. CV 69-2301 RJK
Walter Feinstein, et al.,
Plaintiffs,

vs.

The Nettleship Company of Los Angeles, et al.,
Defendants.

NOTICE OF APPEAL

[Filed Sept. 28, 1977]

NOTICE IS HEREBY GIVEN that plaintiffs above named hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order and Opinion of the District Court filed August 2, 1971 and from the Memorandum and Decision of the District Court dismissing the action dated August 24, 1977 and from the Judgment entered thereon on August 31, 1977.

Dated: September 27, 1977.

ALIOTO & ALIOTO
JOSEPH M. ALIOTO
LAWRENCE JOHN APPEL
By /s/ LAWRENCE JOHN APPEL
Lawrence John Appel
Attorneys for Plaintiffs

Appendix K

United States District Court
Central District of California

No. CV 69-2301-RJK

Walter Feinstein, et al.,
Plaintiffs,
vs.
Nettleship Co., of Los Angeles, et al.,
Defendants.

[Filed Aug. 24, 1977]

MEMORANDUM OF DECISION AND ORDER

This action raises claims under §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1970). Plaintiffs, a group of physicians asserting individual claims as well as claims on behalf of other physicians similarly situated, allege that defendants, brokers and carriers of medical malpractice insurance, have combined and conspired to monopolize, have monopolized, and are attempting to monopolize the trade and commerce of medical malpractice insurance in California. The complaint further alleges that said defendants also have combined and conspired to restrain trade and commerce in the sale, brokerage, and underwriting of medical malpractice insurance. Defendants are charged with six specific courses of conduct undertaken in furtherance of their conspiracy to monopo-

lize, attempt to monopolize, exercise of monopoly power, and conspiracy to restrain trade. It is alleged defendants:

(a) Suppressed by boycott or threat of boycott any independent insurance broker or carrier who attempted to provide competitive medical malpractice insurance to medical doctors;

(b) fixed the prices of medical malpractice insurance to medical doctors at an exorbitant and outrageously high price;

(c) forced, intimidated, threatened, and coerced medical doctors to purchase all other necessary types of insurance coverage from defendants and co-conspirators as a condition precedent to the issuance of medical malpractice insurance to said doctors;

(d) had meetings between themselves and co-conspirators to determine arbitrarily high and noncompetitive premium rates for medical malpractice insurance;

(e) met and prepared biased, false and misleading statistical tabulations and other publications of defendants' and co-conspirators' financial position and of market trends in an attempt to justify and legitimize defendants' and co-conspirators' anti-competitive prices; and

(f) attempted to coerce, harass, and suppress any medical doctor from taking affirmative action to rectify and adjust this predatory situation, by threatening cancellation of said doctors medical malpractice insurance, or in the alternative the charging of even higher insurance premium to said doctor. Complaint ¶ 16(a)-(f).

These allegations constitute the substance of plaintiffs' claims under the Sherman Act.

Plaintiffs and the class they seek to represent are medical doctors in Los Angeles County who contract for medical malpractice liability insurance through defendant Nettleship Company. The proposed class numbers about 10,000 persons. Nettleship is an insurance broker and underwriting manager which issued policies of medical malpractice insurance to the plaintiffs through a plan developed in conjunction with the Los Angeles County Medical Association.[1]

The other named defendants[2] are carriers of medical malpractice insurance who formed a "pool" in order to underwrite the policies offered by Nettleship to plaintiffs. The complaint alleges that the defendant insurance carriers, through Nettleship, write virtually all of the medical malpractice insurance for physicians in Los Angeles County and that on the basis of this market control, defendants have monopolized and conspired and attempted to monopolize the market of medical malpractice insurance in Los Angeles County, fixed exorbitantly high premium rates for such insurance, and eliminated competition from the market so as to preclude physicians from obtaining insurance from other sources.

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[1]Although not stated in the complaint, the record suggests that one of the alleged co-conspirators of the defendants not named in the action is the Los Angeles County Medical Association (LACMA) and that only members of the LACMA were eligible to purchase malpractice insurance through the plan administered by Nettleship.

[2]Pacific Indemnity Co., Insurance Company of North America, Sentry Insurance, American Re-Insurance Company, and North American Re-Insurance Corp. By Stipulation of the parties filed March 18, 1970, Sentry Insurance was dropped as a defendant and Hardware Mutual Casualty Company was added as a defendant.

On allegations (b), (d), and (e) of paragraph 16 of the complaint, pertaining to the pricing practices of defendants, the Court by order and opinion filed August 2, 1971, granted partial summary judgment for the defendants, dismissing the antitrust claims founded upon these allegations on the ground they are exempt from antitrust attack by the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.* (1970). The Court found that the pricing practices challenged by plaintiffs, specifically those addressed by ¶ 16(b), (d) and (e) of the complaint, are matters involving the business of insurance over which the State of California has exercised its regulatory power "so as to bring into play the exemption provided in the McCarran-Ferguson Act." *See* August 2, 1971 opinion and order, at 5. In that the motion for summary judgment upon which the Court ruled was directed only to the price-fixing and related claims, the Court expressed no view on the merits of the boycott, coercion, and intimidation claims and directed that the action would proceed only as to them.

Presently pending before the Court are defendants' motion for summary judgment on the remaining claims of boycott, coercion, and intimidation, and plaintiffs' motion for a determination that the action may proceed as a class action. The matters having been fully briefed by the parties, we now turn to a consideration of the merits.

Applicability of § 1013(b).

The McCarran-Ferguson Act exempts the business of insurance from the federal antitrust laws to the extent

such business is subject to state regulation. 15 U.S.C. § 1012(b). Section 3(d) of the Act, 15 U.S.C. § 1013(b) (1970) (hereinafter "§ 1013(b)"), however, provides a narrow exception to the exemption, one applicable to agreements or acts of boycott, coercion or intimidation. It provides.

> Nothing contained in this Chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation.

15 U.S.C. § 1013(b) (1970).

Because it has previously been determined that the McCarran-Ferguson exemption applies to this action by virtue of California's regulation of the insurance industry, *see* August 2, 1971 opinion and order; *Addrisi v. Equitable Life Assurance Society of United States*, 503 F.2d 725, 728 (9th Cir. 1974), in order to survive defendants' suggestion that the complaint fails to state a cause of action upon which relief can be granted, plaintiffs must show that their claims of boycott, coercion and intimidation fall within the scope of § 1013(b). Before determining the applicability of § 1013(b), it is necessary to fully and accurately characterize plaintiffs' grievances at issue here.

Plaintiffs' general allegations of monopoly, and conspiracy and attempt to monopolize, and of conspiracy and combination to restrain trade must be viewed in the light of the specific factual allegations underlying the claims. ¶ 16(a) of the complaint asserts that defendants, in carrying out their alleged antitrust violations, have illegally "suppressed by boycott or threat of boycott any inde-

pendent insurance broker or carrier who attempted to provide competitive medical malpractice insurance to medical doctors." The boycott alleged is one directed against independent insurance brokers or carriers who attempted to offer physicians in Los Angeles County medical malpractice insurance other than that offered by the defendants. ¶ 16(c) of the complaint alleges intimidation and coercion on the part of the defendants, stating that they "forced, intimidated, threatened, and coerced medical doctors to purchase all other necessary types of insurance coverage from defendants and co-conspirators as a condition precedent to the issuance of medical malpractice insurance to said doctors." In substance, the allegation is that plaintiffs and members of the class they purport to represent were coerced and intimated into purchasing other types of insurance coverage from defendants in order to be eligible for the purchase of medical malpractice insurance. ¶ 16(f) of the complaint further alleges a course of conduct of coercion, stating that defendants "attempted to coerce, harass, and suppress any medical doctor from taking affirmative action to rectify and adjust this predatory situation, by threat and cancellation of said doctors' medical malpractice insurance, or in the alternative the charging of even higher insurance premiums to said medical doctors." The allegation thus charges an attempted pattern of retaliation, in the form of threatened cancellation or increased premiums, directed toward those physicians who contemplated rectifying the perceived antitrust violations.

The law in this Circuit on the reach of § 1013(b) is unequivocal. In *Addrisi v. Equitable Life Assurance So-*

ciety of United States, 503 F.2d 725 (9th Cir. 1974), upon examining the the [sic] legislative history of § 1013(b), the Court concluded that Congress intended by this section to make subject to the Sherman Act only "antitrust acts among insurance companies and agents for the purpose of boycott or coercion among insurance companies and agents." *Id.* at 729. The Court specifically held that customers and policyholders of insurance companies may not take advantage of § 1013(b), noting that the legislative history indicates that the exception was included in the McCarran-Ferguson Act to protect insurance agents from being coerced by insurance companies to refrain from dealing with blacklisted companies or agents.[3] The purpose of § 1013(b) clearly was to offer protection for insurance agents and companies rather than for policyholders and purchasers of insurance policies. *Adrisi* [sic] *supra*, at 729; *see Meicler v. Aetna Casualty and Surety Co.*, 372 F.Supp. 509 (S.D.Tex. 1974); *Transnational Insurance Co. v. Rosenlund*, 261 F.Supp. 12 (D.Ore. 1966). Plaintiffs have cited no decisions suggesting that policyholders enjoy the protection of § 1013(b).

Plaintiffs' allegation that defendants forced, intimidated, threatened, and coerced physicians to purchase

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[3]The Court adopted the following language from *Transnational Ins. Co. v. Rosenlund*, 261 F.Supp. 12, 26-27 (D.Ore. 1966):

> The legislative history shows that the boycott, coercion and intimidation exception was placed in the legislation to protect insurance agents from the issuance by insurance companies of a "blacklist," which would name companies or agents which were beyond the pale. This list, in effect, was a directive to an agent not to write insurance in the name of or for the black-listed company; otherwise, he would be stripped of his agency and not permitted to write insurance for any of the members of the governing organization of insurance companies.

other types of insurance coverage from defendants as a condition precedent to the purchase of malpractice insurance obviously does not come within § 1013(b) in that it alleges a wrong to purchasers of insurance policies. Indeed the allegation is virtually identical to the one rejected by the Court in *Addrisi*.[4]

The allegation that physicians were coerced, harassed, and suppressed from taking corrective action against the practices alleged herein similarly does not fall within § 1013(b); the fatal flaw again is that § 1013(b) offers no protection to policyholders.

The remaining allegation of the complaint at issue, ¶ 16(a), alleges that defendants suppressed by boycott or threat of boycott independent insurance brokers and carriers who attempted to offer medical malpractice insurance to plaintiffs and other physicians in Los Angeles County. A twofold inference arises from the allegation; that independent insurance brokers and companies were injured by the boycott and threats of boycott when restrained from offering medical malpractice insurance, and that physicians who were not satisfied with the insurance coverage provided by defendants were injured insofar as they attempted to buy alternative forms of insurance coverage and were unable to do so.

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[4]In *Addrisi* the complaint alleged that the defendant insurer, as a condition to granting loans for the purchase of a new home, required those seeking such loans to purchase a life insurance policy from the company. Plaintiffs' argument that that practice constituted an illegal tie-in arrangement under the antitrust laws and was subject to antitrust consideration by virtue of the coercion exception of § 1013(b) was rejected by the Ninth Circuit on the ground that § 1013(b) was not intended to offer protection to persons in plaintiffs' position. 503 F.2d at 729.

It is clear that as policyholders, plaintiffs are not entitled to take advantage of a § 1013(b) to assert their claims that they were prevented from buying alternative policies of insurance because of the alleged suppression of independent brokers and companies. Under general principles of standing in antitrust actions, customers injured by an illegal boycott may have a cause of action. However, case law construing § 1013(b) establishes the controlling principles on standing in matters involving the McCarran-Ferguson Act; this Circuit has ruled in no uncertain terms that the § 1013(b) exception is not available to customers and policyholders to assert their own antitrust claims. In *Meicler v. Aetna Casualty and Surety Co.*, 372 F.Supp. 509 (S.D.Tex. 1974), plaintiffs, policyholders of automobile liability insurance, sued numerous carriers of automobile insurance on a theory of boycott to challenge the defendants' adherence to a classification plan by which plaintiffs were reclassified and charged higher premiums on the same policy limits. The gravamen of the complaint was that defendants, in refusing to offer plaintiffs the terms of the original coverage after the original insurer had reclassified them, engaged in a concerted refusal to deal and group boycott. The antitrust claim was dismissed on the grounds that it raised matters concerning the business of insurance which was regulated by Texas and that § 1013(b) was not available as a means of avoiding the McCarran-Ferguson Act. *Id.* at 513-14. Insofar as the claim of plaintiffs here asserts injury by boycott and refusal to deal, even though the refusal to deal may be effectuated through boycott of intermediary insurance brokers, it must be dismissed because it is not covered by the limited reach of § 1013(b).

If the complaint is read as asserting a cause of action on behalf of independent insurance agents and companies who may have been injured by the alleged boycott or threat of boycott, similarly it must be dismissed on the ground that plaintiffs lack standing to sue on this claim. Initially, plaintiffs are confronted with the Court's general disfavor toward the standing of parties to assert the rights of others. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727 (1972); *Tileston v. Ullman*, 318 U.S. 44 (1943). It is highly questionable whether these plaintiffs have a sufficient "personal stake in the outcome of the controversy" to justify the invocation of jurisdiction. *Baker v. Carr*, 369 U.S. 186, 204 (1962). Since any recovery of damages would accrue only to the injured insurance brokers and companies as the proper party plaintiffs, it must be assumed that the vigor and industry with which plaintiffs would prosecute the action would be appreciably less than if plaintiffs could participate in an award of treble damages. While plaintiffs would be the beneficiaries of injunctive relief if such were ordered, their inability to recoup their losses from the past raises serious doubts as to the extent of their personal stake in the litigation.

There is a more compelling reason, however, to deny standing. The intent of Congress in enacting § 1013(b) was to permit only those insurance agents and companies facing boycott by other insurance companies to invoke federal jurisdiction for their antitrust claims. It would subvert this congressional intent to grant policyholders standing to raise claims on behalf of insurance agents where the policyholders' purpose primarily is to redress

their own injuries and only secondarily to protect the interests of those parties for whom § 1013(b) was designed. To permit standing in such a situation surely would broaden the scope of ¶ 1013(b) beyond that intended by Congress.

Accordingly, the remaining claims of the complaint are dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief may be granted and upon this disposition and ruling of the Court reported in its opinion and order of August 2, 1971, plaintiffs' cause of action is dismissed in its entirety. In light of this dismissal, it is unnecessary to consider plaintiffs' motion to have the action maintained as a class action.

It is hereby ORDERED that the remaining claims of boycott, coercion and intimidation are dismissed, and that the action is dismissed in its entirety.

The Clerk shall serve, by United States mail, a copy of this Memorandum of Decision and Order on counsel for the parties.

Dated: August 24, 1977.

s/s Robert J. Kelleher
Robert J. Kelleher
United States District Judge

Appendix L

In the United States District Court
for the Central District of California

Civil No. 69-2301-RJK

Walter Feinstein, et al.,
Plaintiffs,

vs.

Nettleship Co. of Los Angeles, et al.,
Defendants.

OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT, DENYING PLAINTIFFS' MOTION FOR DETERMINATION OF CLASS ACTING STATUS, GRANTING COUNTER-DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE COUNTERCLAIM

[Filed Aug. 2, 1971]

Defendants' Motion for Partial Summary Judgment

By this action, filed November 13, 1969, a group of Los Angeles County physicians seek damages and injunctive relief for defendants' alleged violations of the federal antitrust laws[1] in the sale, brokerage and underwriting of physicians' medical malpractice insurance; specifically, the complaint alleges that defendants have, by conspiracy: (a) suppressed competition in the medical malpractice

[1] 15 U.S.C. §§ 1, 2 ("Sherman Act") and 15 U.S.C. §§ 15, 16 ("Clayton Act").

insurance field by boycott and threat thereof, (b) fixed prices of such insurance at exorbitant levels, (c) coerced plaintiffs to purchase other types of insurance by virtue of defendants' monopolization of medical malpractice insurance commerce, (d) held meetings to advance their price-fixing schemes, (e) prepared false, misleading and untrue statistics to justify and legitimize their anti-competitive prices, and (f) by threat of cancellation, coerced and harassed physicians who have attempted to rectify defendants' predatory practices. [Part VII, para. 16, Complaint]

Defendants brought the present motion for partial summary judgment, which both sides appear to concede should be viewed as a motion to dismiss, to test their claimed exemption under the McCarran-Ferguson Act[2] from operation of the federal antitrust laws, asserting that this field of economic regulation has been preempted by passage and implementation in California of a comprehensive insurance regulatory scheme.[3] Four of the six defendants herein are reinsurers of the policies brokered and underwritten by defendants Nettleship Co. and Pacific Indemnity, respectively; though the reinsurer defendants' liability for the offenses charged in the complaint may be factually distinguishable, for purposes of the present motion the reinsurer defendants' rights to exemption by virtue of the McCarran-Ferguson Act would appear identical to those claimed by Nettleship and Pacific Indemnity.

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[2]15 U.S.C. §§ 1011-1015.

[3]California Insurance Code, §§ 1850-1860.3.

Congress enacted the McCarran-Ferguson Act in the wake of the United States Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S. Ct. 1162 (1944), reversing the long established view that the "business of insurance" was not interstate commerce, to permit and support the traditional exercise of state regulatory power in the insurance[4] field by specifically providing that federal antitrust laws shall not apply to the insurance business except (1) to the extent state laws do not regulate insurance firms [15 U.S.C. § 1012(b); *F.T.C. v. Travelers Health Association*, 362 U.S. 293, 300, 80 S. Ct. 717, 721 (1960)], and (2) to the extent insurance firms engage or agree to engage in acts of economic boycott, coercion or intimidation [15 U.S.C. § 1013(b); *California League of Ind. Ins. Pro. v. Aetna Cas. & S. Co.*, 179 F. Supp. 65 (N.D. Calif. 1959); *Professional & Business Men's L. I. Co. v. Bankers Life Co.*, 163 F. Supp. 274 (D.Mont. 1958); *United States v. New Orleans Insurance Exchange*, 148 F. Supp. 915 (E.D. La. 1957), aff'd 355 U.S. 22, 78 S. Ct. 96, reh. denied 355 U.S. 901, 78 S. Ct. 329 (1957); *United States v. Insurance Board of Cleveland*, 144 F. Supp. 684 (N.D. Ohio 1956)].

The present motion does not appear directed to plaintiffs' allegations of boycott, coercion and intimidation [defendant-Pacific Indemnity's Notice of Motion, page 1, lines 29-30] and, for that reason alone, the Court declines to pass upon what appear to be the fatally con-

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[4] *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 66 S. Ct. 1142 (1946).

clusory boycott, intimidation and coercion allegations of the complaint.

Plaintiffs premise their argument in support of the remaining allegations of price-fixing upon their contention that the California insurance rate-regulatory scheme depends primarily, for its operation, upon competitive forces within the insurance industry rather than administrative rate-setting [California Insurance Code, section 1850], hence, suspending application of the federal antitrust laws by virtue of the McCarran-Ferguson Act would confer upon California carriers blanket immunity from both direct regulation and federal antitrust enforcement, a result clearly not intended by the Act.

Plaintiffs' argument strikes the Court as somewhat anomalous—that a state sanctioned scheme of competitive rate-making is of necessity inferior to a federally sanctioned system and, thus, not envisaged by the Act. While the Court rejects defendants' apparent argument that operation of federal antitrust laws are wholly superseded by state regulation of the insurance industry [see *F.T.C. v. Travelers Health Association*, 362 U.S. 293, 80 S. Ct. 717 (1960); *United States v. Chicago Title and Trust Co.*, 242 F. Supp. 56 (N.D. Ill. 1965); *Monarch Life Ins. Co. v. Loyal Protective Life Ins. Co.*, 326 F. 2d 841 (2d Cir. 1963); *cf*: *Holly Springs Funeral Homes, Inc. v. United Funeral Service, Inc.*, 303 F. Supp. 128 (N.D. Miss. 1969); *Transnational Insurance Co. v. Roselund*, 261 F. Supp. 12 (D.Ore. 1966)], the Court does not believe, as plaintiffs would have the Court hold, that California's regulatory scheme has a lessor [sic] claim to precedence over the federal antitrust laws because it

differs in substantial respects from more direct regulatory schemes employed in other states. The concept of regulation by the states embodied in the Act must, of necessity, have contemplated considerable diversity.

Nor is the Court constrained to find, as plaintiffs contend, that the operational effect of the state scheme must parallel the results which might reasonably be achieved were federal antitrust laws fully applied to the insurance industry. See *Allstate Insurance Co. v. Lanier*, 361 F. 2d 870 (4th Cir. 1966), *cert.* denied, 385 U.S. 930, 87 S. Ct. 290 (1966). Instead, the Court need only determine that the design and purpose of the state scheme meets certain fairly minimal standards of regulation to take precedence over federal antitrust enactments. *Allstate Insurance Co. v. Lanier*, 242 F. Supp. 73, 88 (E.D. N.C. 1965).

By this standard, the California plan of regulating the pricing behavior of insurance firms appears sufficient. *California League of Ind. Ins. Pro. v. Aetna Cas. & S. Co.*, 175 F. Supp. 857 (N.D. Calif. 1957). The California Insurance Code provides the Insurance Commissioner with broad investigatory powers [sections 730-738, 1857-1857.4, 12924] to determine whether rates are excessive, inadequate or unfairly discriminatory [section 1850] and upon complaint conduct such hearings as may be necessary to conclude that probable cause of a violation of the Code's rate standards is lacking [sections 1858-1858.6]. The Commissioner is specifically authorized to suspend or revoke the license of any carrier who has violated the Code [sections 1858.3(c)-1858.4]. Moreover, California insurance underwriters, brokers and agents face possible application of state antitrust enactments, California

Business & Professions Code, sections 16720-16758. *Speegle v. Board of Fire Underwriters*, 29 Cal.2d 34, 172 P.2d 867 (1946). Whether the California plan embodies the most effective and wisest type of regulation is not for this Court to determine. It is sufficient to find, and the Court does, that the State has exercised its regulatory power in the field so as to bring into play the exemption provided in the McCarran-Ferguson Act.

Plaintiffs' Motion for Determination of Class Action Status

In view of the Court's determination that the McCarran-Ferguson Act precludes plaintiffs' action under the federal antitrust laws for defendants' alleged price-fixing of medical malpractice insurance, the case can proceed only on plaintiffs' allegations of illegal boycott, coercion and intimidation, leaving the substance of plaintiffs' case sufficiently uncertain that the Court cannot at this juncture determine whether the prerequisites of F.R.Civ.P. 23 have been met, particularly whether the alleged boycott, coercion and intimidation affect all or most of the eleven thousand practicing physicians in Los Angeles County, which plaintiffs claim to represent, in a substantially similar manner, and whether the interest of the asserted class predominates over the interest of individual physicians to be free of defendants' allegedly unlawful activities.

Plaintiffs' Motion for Summary Judgment on Defendant Nettleship Co.'s Counterclaim.

By this counterclaim, defendant Nettleship Co. seeks $10,000,000.00 actual and punitive damages for allegedly slanderous statements made by plaintiff Kriegsman, acting for himself and the other plaintiffs, allegedly to the effect that Nettleship Co.'s brokerage of medical malpractice insurance to Los Angeles County Physicians is an "extortion racket; a protection racket," and statements of similar purport which were made to individual groups of physicians and to various organized meetings of physicians in an effort to enlist their support for plaintiffs' efforts to decrease the cost of such insurance.

Words such as "blackmail," "extortion" and the like are often used quite loosely in common parlance and are often applied, however inappropriately, to entirely legal and ethical activities. Recognizing this fact, the Supreme Court in *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6, 90 S. Ct. 1537 (1970), reversed a Maryland state court judgment obtained by a prominent real estate developer and builder against a local newspaper that had accurately recounted in its news columns a public meeting where certain persons had characterized the plaintiff's negotiating position with respect to obtaining zoning variances as "blackmail." The record in that case convinced the Court that no participant in the meeting and no reader of the newspaper account could have reasonably concluded from what was said that plaintiff had committed such a crime and, thus:

". . . the word 'blackmail' in these circumstances was not slander when spoken, and not libel when reported in the Greenbelt News Review."
[398 U.S. at 13, 90 S. Ct. at 1541]

This court is much inclined to believe from what now appears in the record that Dr. Kriegsman's remarks, however ill advised, were made in the same vein and are, therefore, not, as a matter of law, defamatory. Indeed, it seems especially incredible that sophisticated persons, such as physicians, certainly knowledgeable about a matter of such keen professional interest as malpractice insurance, could have construed Dr. Kriegsman's remarks to mean that Nettleship Co., by its brokerage of such insurance, was engaged in an unethical activity, much less the criminal act of extortion.

The Court is mindful, however, that a complete record was before the Supreme Court in the *Greenbelt Cooperative* case; moreover, summary judgment in defamation cases is not appropriate where the statements complained of are susceptible of both a defamatory and non-defamatory meaning and it may be that counterclaimant can establish the defamatory character of Dr. Kriegsman's statements. Though the Court entertains very serious reservations about the actionability of these remarks, the Court, at this time and on the present record, is not prepared to conclude, as a matter of law, that his statements are not defamatory or are otherwise protected.

This opinion and order will be deemed to constitute Findings of Fact and Conclusions of Law.

Upon the foregoing, It Is Ordered that defendants' motion for partial summary judgment be and the same is hereby granted as to paragraph 16, subsections (b), (d) and (e), of the complaint and those portions of paragraphs 14 and 15 related thereto.

It Is Further Ordered that plaintiffs' motion for class action status under F. R. Civ. P. 23 be and the same is hereby denied without prejudice.

It Is Further Ordered that plaintiffs' [counter-defendants'] motion for summary judgment on the counterclaim be and the same is hereby denied without prejudice.

It Is Further Ordered that the Clerk of the Court send, by United States mail, copies of this opinion and order to all counsel herein.

Dated: August 2, 1971

/s/ Robert J. Kelleher
Robert J. Kelleher
United States District Judge

In the United States District Court
for the Central District of California

Civil No. 69-2301-RJK

Walter Feinstein, et al.,
Plaintiffs,
vs.
Nettleship Co., of Los Angeles, et al.,
Defendants.

[Filed Aug. 5, 1971]

ORDER AMENDING OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT, ETC.

It Is Ordered that the title of the Opinion and Order of this Court, entered on August 2, 1971, is hereby amended to read:

"OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT, DENYING PLAINTIFFS' MOTION FOR DETERMINATION OF CLASS ACTION STATUS, DENYING COUNTER-DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON THE COUNTERCLAIM."

It Is Further Ordered that the Clerk of this Court send, by United States mail, copies of this order to all counsel herein.

Dated: August 5, 1971

/s/ Robert J. Kelleher
Robert J. Kelleher
United States District Judge

Appendix M

McCARRAN ACT — THE CONGRESSIONAL DEBATES

(1) The Initial Act and Intent (Senate Bill 340)

The *McCarran Act* in its first form provided as follows:

"Be it enacted, etc., That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

SEC. 2 (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation of taxation of such business.

(b) No act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such act specifically so provides.

SEC. 3. Nothing contained in the act of September 26, 1914, known as the Federal Trade Commission Act, as amended, or the act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall apply to the business of insurance or to acts in the conduct of that business.

SEC. 4. (a) *For the purpose of enabling adjustments to be made* and legislation to be adopted by the several States and Congress, *until June 1, 1947*, the act of July 2, 1890, as amended, known as the Sherman Act, *shall not apply to the business of insurance*, or to acts in the conduct of such business, and *until January 1, 1948*, the act of October 15, 1914, as

amended, known as the Clayton Act, *shall not apply to such business* or to acts in the conduct thereof.

(b) Nothing contained in this section shall render the said Sherman Act inapplicable to any agreement or act of boycott, coercion, or intimidation. . . ." 91 *Congressional Record*, 478 (emphasis supplied).

Senators Ferguson and O'Mahoney state the purpose of the *McCarran-Ferguson Act* as initially proposed:

"MR. FERGUSON. At the present time, *every state rate-fixing authority violates the Sherman Act* or the Clayton Act, or both. There are many State laws which violate the Sherman Act and the Clayton Act. It is our purpose to permit those laws to continue in force and effect until at least 1947 and 1948.

• • •

"MR. O'MAHONEY. I am satisfied that the purpose of the Senator from Michigan and my purpose are identical. The purpose is to *enable the States and the Congress to have time to adjust a very complicated business to a decision of the Supreme Court and to the antitrust laws.* There is no purpose to issue an invitation from the United States Senate to the States to enact laws which would establish monopolies in this business. . . .

We are extending to the States complete immunity for their State *tax laws*, and, as stated in section 4, we are granting a moratorium *for the purpose of enabling adjustments to be made and legislation to be adopted by the several states.* . . ." 91 *Congressional Record* 484, 488.

Senate Bill 340, the first version of the *McCarran Act*, taken up for debate after the resounding defeat of the

Walter Bill which would have completely immunized the industry from federal antitrust claims, expresses the initial intent of Congress to limit the insurance industry to a three year moratorium from prosecution under the federal antitrust laws.

Under the initial version of the *McCarran Act*, the states and the insurance industry would have three years to "put their houses in order". Upon the lapse of the moratorium insurance industry practices were to conform to federal antitrust statutes and policy and the federal antitrust laws were to then be applicable to the business of insurance *irrespective* of state action, 91 *Congressional Record* 478, 480, 483, 484.

(2) The Final Act and Intent (The McCarran-Ferguson Act)

The *McCarran Act*, in pertinent part, is quoted as follows:

> "[Section 1011] That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> [Section 1012] (a) The business of insurance and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the

business of insurance: Provided, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by state law.

[Section 1013] (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and the Act of June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

• • •

During the course of debate, and as a result of intense insurance industry pressure and Senate-House conference, the initial intent of Congress, that the relief provided to the insurance industry and to the various states be limited to a three year moratorium during which it would be required that industry practices and state laws be adjusted to conform to the federal antitrust laws and after which the federal antitrust laws would apply to business of insurance without exception or exemption and *irrespective* of state authorization or permission gradually eroded to compromise.

The precise point debated was whether the original version of the *McCarran Act* would be amended to allow

the various states to enact legislation during the three year moratorium *authorizing or permitting* certain contracts and agreements by insurance companies which might otherwise violate the *Sherman* or *Clayton Acts*, and, whether by virtue of said specific state approval and authorization such contracts and agreements would be exempted from prosecution under the federal antitrust laws:

"Mr. O'Mahoney . . . The questions which have been raised by the Senator from Utah prompted me to ask the Senator from Michigan this question: Does the Senator from Michigan conceive that the impending bill as reported by the Judiciary Committee, with the language which I have just read, has the effect of making it possible for a *State* to *legalize* contracts in restraint of trade or has the effect of making it possible for any State to *authorize* attempts on the part of any group of insurance companies to monopolize the business of insurance. I did not understand that to be the opinion of the Senator from Michigan.

Mr. Ferguson. No. I will answer that by saying that if agreements in restraint of trade or to monopolize amounted either to a boycott and/or coercion and/or intimidation, they would be absolutely void, because they would contradict the bill which is now being considered by the Senate and which it is hoped will be passed today. But *certain agreements* might be *permitted* in the States if they did not violate the terms of this bill."

• • •

"Mr. O'Mahoney. Does the Senator desire to tell the Senate that it is his purpose and the purpose of the pending bill to say to the *State legislatures* that laws may be enacted which will *permit* monopoly to be created in the insurance industry?

• • •

. . . This is the important part of the report, and I think it is in full conformity with the bill itself 'but opportunity will have been granted for the *States to permit agreements.*' What kind of agreements? Agreements which do not conflict with the restrictions in subsection (b) of section 4, but 'agreements and contracts by insurance companies which otherwise' — 'which otherwise' — and I stress these words of the report 'might be in violation of the Sherman and Clayton Acts.'

Certainly the very purpose of the bill, if subsection B of section 2 is not stricken, is to provide that *State legislatures, if they so desire, may relieve insurance companies from contracts in restraint of trade which are prohibited by the Sherman Act, so long as such contracts and agreements do not come within the inhibition of subsection (b) of section 4,* which refers to agreements or acts of boycott, coercion, or intimidation. The report itself, in my opinion, answers the Senator from Wyoming.

"Mr. Ferguson. Mr. President, I will answer the question of the Senator from Wyoming in the same way the able Senator from Utah has answered it. Just as he read, the bill provides that agreements or contracts may be *permitted* by *State* legislature within the moratorium period if they do not violate paragraph (b) of section 4."

• • •

"Mr. O'Mahoney. Mr. President, the bill which was presented by the Senator from Wyoming contained a section which does not appear in the pending bill, a section which undertook to exempt from the effect of the antitrust law certain types of combinations and agreements, but *certainly not such an agreement as would enable any State to be in the position of authorizing the establishment of monopoly.* It was

clearly with the understanding that the bill was a good-faith attempt not to get around the antitrust laws, or the decision of the Supreme Court, *but to enable the insurance industry and the States to accommodate themselves to the decision and to the antitrust laws,* that the Judiciary Committee made a unanimous report."

* * *

"Mr. O'Mahoney. Does the Senator from Michigan desire that the bill, if it shall be passed by this body, shall be interpreted anywhere as an intention of Congress to *permit* monopoly to be established in the insurance industry?

Mr. Ferguson. No; by no means does the bill anticipate that any act would or should be passed which would create *monopoly.*

Mr. O'Mahoney. Then, does the Senator believe that the bill as it now stands permits that interpretation?

Mr. Ferguson. It would permit it. I understood the Senator from Wyoming to be familiar with the language on page 2, which was read by the able Senator from Utah, and I think the bill is broad enough to allow a State to pass a law allowing any agreement or contract other than those inhibited in paragraph (b) of section 4. But it is *not* the purpose of the bill at all to *foster monopoly,* or to anticipate that any act will be passed *permitting* or even encouraging monopoly. A state law relating to *taxation,* a law relating to regulation, for instance, *the fixing of rates,* or the *fixing of the terms of a contract of insurance,* which might under some definitions of monopoly be monopolistic, would be permitted under the pending bill; but if the State law undertook to *authorize* a boycott, a coercion, or an intimidation, or an agreement to do any one of those three things,

then it would be clearly void because Congress would have already spoken, and once Congress speaks on interstate commerce, no State can speak contrary to the congressional declaration.

"Mr. Murdock. My understanding of what the Senate Judiciary Committee wanted to do and what I hoped it would do was that we would by the enactment of a bill of this kind call the attention of the respective States of the Union to the fact that the Supreme Court of the United States had held that the business of insurance is commerce, and knowing that certain hardships were inevitable because of past practice and procedure, it was my intention, and I thought *the intention of the Committee on the Judiciary, to say to the States,* 'For a certain period, long enough for you to take action, *you* will be allowed to make adjustments of your State laws to *harmonize* with the decision of the Supreme Court of the United States.' But under the bill we would not do that. In my opinion, we would do exactly what the Senator from Wyoming implies we would do—that is, invite the respective *State* legislatures to pass acts which would permit agreements which would otherwise be in violation of the Sherman Act.

* * *

Mr. Murdock. I am quite satisfied that it is the intention of the Senator and the intention of the Committee on the Judiciary to grant a moratorium and invite the States to step in and regulate the insurance business. It seems to me that if the Senator would agree to striking from the bill subsection (b) of section 2, and then agree to the other amendment which I suggest in subsection (b) of section 4, that we would do that very thing; but we would not take the long step which has been indicated today by the Senator from Wyoming of *inviting State legislation, permit-*

ting violation of the Sherman Act as to monopolies and agreements in restraint of trade. I do not believe that any Senator wants to invite any State legislature to step into the insurance field and *permit* contracts and agreements in restraint of trade or contracts and agreements which would evade the monopoly provisions of the Sherman Act." 91 *Congressional Record*, 479, 480, 481 (emphasis supplied).

"Senator O'Mahoney: Section 2(b) was drafted and written into the bill which I introduced, in the belief, not that it would be interpreted as an additional exception from the antitrust laws, but that it would be a sort of catch-all provision to take into consideration other acts of Congress which might affect the insurance industry, but of which we did not have knowledge at the time.

I am sure that the Senator from Michigan does not wish to ask the Senate, in view of the interpretation which has been placed upon this section, to enact that provision. To do so would put us in the position of *saying that any State if it so desires, may authorize monopolies.*" 91 *Congressional Record*, 483 (emphasis supplied).

• • •

Mr. Revercomb. As I see it, two things are proposed by this bill. Not only a moratorium with respect to the Sherman Act and the Clayton Act—and we all agree that that is its purpose—but it goes further than that, if I may so to the able Senator, and carries out the purpose of giving power to the States of regulation of insurance and the taxing of insurance companies, *so long as they do not get into conflict with a Federal law.* The section before us provides that no act of Congress shall be construed to invalidate a State law unless the act of Congress specifically states that the State law is in conflict with the Federal act and is designed to override it.

Mr. Murdock. Will the Senator yield further?

Mr. Revercomb. I yield.

Mr. Murdock. Then it is applicable, it does apply, does it not, to the Sherman Act, and also to the Clayton Act, presently, because neither one of those acts specifically repeals or impairs or invalidates any State law?

Mr. Revercomb. I do not agree with that conclusion, because section 4 of the bill *specifically says that the Clayton Act and the Sherman Act shall again be in force on the dates mentioned.*" 91 *Congressional Record* 486 (emphasis supplied).

The House, in acting upon Senate Bill 340, amended it to exclude the "No act except the Sherman . . . ," and also deleted the "agreement to boycott", etc., language, (91 *Congressional Record* 1085).

It should be noted that in this amended form the Bill, by making the *Sherman* and *Clayton Acts* applicable to the business of insurance after January, 1948, (Section 4a) would allow those acts to "impair, invalidate or supersede," (Section 2b) state laws which *authorized* or *permitted* activity contrary to the antitrust laws.

Mr. Walter in the House gives some idea of the pressure being applied to the states by the Insurance Industry.

". . . I say that because within the last month the attorney general of the State of North Carolina has held that the *State can no longer collect the taxes paid by insurance companies doing business in the State of North Carolina because insurance is now interstate commerce and therefore the regulations imposed by the several States are not legal. . . .*

> This is another reason why it is imperative that something be done immediately; *but the most important practical phase of the whole situation is that taxes due and owing to the insurance departments of the several States are collected between the 20th of February and the 10th of March.* It will be easy to compromise our views with the bill passed by the Senate; our views are contained in the bill recommended by the Committee on the Judiciary of the House." 91 *Congressional Record* 1086 (emphasis supplied).

The debates in the House then turn to the question of whether or not states will be allowed to *permit* some activities, [state authorized rating bureaus which would fix premium rates under state supervision], which might "otherwise be violative of the antitrust laws."

> "Mr. Hancock. . . . Therefore it is imperative, if we are to *preserve the rights of the States to tax the insurance companies on business written within their boundaries,* that we pass an act authorizing them so to do. We have attempted to *accomplish that purpose by sections 1 and 2 of the committee amendment to S. 340.* I am not certain that we can do it but this bill goes as far as we can in an effort to maintain the rights of the States *to tax the insurance business within their respective boundaries. A vast amount of State revenue is involved,* and it is a matter of extreme importance to the States that action be taken to meet an immediate emergency.
>
> There are only two main features in the bill. The second is to grant a moratorium on the application of the anti-monopoly laws until January 1948. Personally, I would rather go much further than this bill goes. I was a strong supporter last year of the Wal-

ter bill, and I would support it today, plus this provision with reference to taxes. But we believe we cannot pass that bill as the Senate is now constituted, and we are told with some assurance that the President would veto it." 91 *Congressional Record* 1087.

In point of fact the main concern of Congress was to reaffirm and make certain that the decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 64 S.Ct. 1162 (1944), would not derogate from the traditional authority of the state to levy and collect taxes from insurance companies doing business within its boundaries and to control the purely local activities of insurance agents.

Mr. Anderson, in attempting to *narrow* the *scope* of activities the states would be allowed to *permit*, made reference to the original House Bill 1590 and the press release commenting on same:

"The American Life Convention, the American Mutual Alliance, the Association of Casualty and Surety Executives, and all these other groups referred to, issued a press release which I have in my hand and which everyone is at liberty to examine. That press release clearly points out why the language that the Committee on the Judiciary has stricken out is in this bill. That press release says:

For the purpose of enabling the business of insurance to make necessary adjustments in organization and operating methods, and in order that the legislatures of the various States may have time in which to adopt laws designed to *authorize* concert of action in rate making and other cooperative activities when *approved by State* supervisory officials, section 4 of the compromise bill granting a moratorium on the Sherman law to June 1, 1947—

> And so forth. That is the basis of the moratorium. That is the basis upon which the letter was sent to Senator Radcliffe by the President of the United States. . ." 91 *Congressional Record*, 1090.

The Bill was then passed by the House, (91 Congressional Record 1094), and, after a conference between the House and Senate, the Bill was reported to the Senate in its final Form, [91 Congressional Record 1357], whereupon the following debate ensued:

> "Mr. Pepper. Does that mean that the States can by their own laws defeat the applicability and operation of the Sherman Antitrust Act and the Clayton Act?
>
> Mr. O'Mahoney. I think the answer to that question will be clear when I point out that there are *certain agreements* which can normally be made in the insurance business which are *in the public interest*, but which *might conceivably be a violation of the antitrust law*, which prohibits combinations and agreements in restraint of trade.
>
> Mr. Pepper. Am I correct in saying that under the proviso which the Senator has just read, *if a State made it an offense*, under the laws of the State, to engage in combinations in restraint of trade, the Sherman Antitrust Act could not apply to combinations and restraints of trade by companies engaged in business in that State? Is not that what it means?
>
> Mr. O'Mahoney. *No;* I think that, for example, a *rating bureau*, formerly agreement among insurance companies, *under the supervision and regulation of State would be permitted.*" 91 *Congressional Record* 1443, 1444.

* * *

Senators Ferguson, Pepper and O'Mahoney crystallize the intent of Congress in the closing Stages of debate:

"Mr. Ferguson. This bill would permit—and I think it is fair to say that it is intended to permit—rating bureaus, because in the last session we passed a bill for the District of Columbia *allowing* rating. What we saw as wrong was the fixing of rates *without statutory authority in the States;* but we believe that State rights should permit a *State to say that it believes in rating bureau. . . .*" 91 *Congressional Record* 1480. (emphasis supplied).

• • •

"Senator Pepper. The able Senator from Michigan has been very candid. It is intended by the proponents of this measure that the right of rate-fixing shall be preserved. The Senator has said that *if* rates are fixed by a rating bureau, and *if the State legislalation legitimizes* that practice, it is intended by the language to which I have referred to approve it." 91 *Congressional Record* 1481 (emphasis supplied).

• • •

"Mr. O'Mahoney. It is the purpose of the proposed act to *grant a moratorium.* It would be an absurd construction to say that in one section of the law a moratorium is provided, but in another section it is provided that there shall be no moratorium.

Within its own boundaries the State *may authorize* agreements for rate making just as the Congress of the United States, by passing the Interstate Commerce Act, authorized rate making by combinations in the railroad field, and just as practically every State in the Union has *authorized* public utility rate making *within the States.* But what I wish to say to the Senator from Florida, and to other Senators as well, without any reservation, is this: When the

moratorium period passes, the Sherman Act, the Clayton Act, and the Federal Trade Commission Act come to life again in the field of interstate regulation. *Nothing in the proposed law would authorize a State to try to regulate for other States, or authorize any private group or association to regulate in the field of interstate commerce.*" 91 *Congressional Record* 1483 (Emphasis supplied).

• • •

Mr. O'Mahoney. Because the committee was cognizant of the fact that many *salutary combinations* might be proposed and which *ought to be approved*, to which there was no objection. From the very beginning, Mr. President, of this controversy over insurance I have always taken the position that I saw no objection to combinations or agreements among the insurance companies in the public interest *provided those combinations and agreements were in the open and approved by law. Public supervision of agreements is essential.*" 91 *Congressional Record* 1486 (emphasis supplied).

In brief, the final intent of Congress in enacting the *McCarran Act*, was to provide the states an option to enact laws pertaining to the business of insurance during the three year moratorium authorizing or permitting certain insurance practices which might violate the federal antitrust laws. If a State did in fact act to authorize or permit such practices an insurance company following the approved practices would not be subject to federal antitrust prosecution.

Appendix N

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United States District Court
For the Central District of California

No. 69-2301-1H

Walter Feinstein; Jason I. Green;
Jack Kriegsman; Leo Miller; and
Morton H. Pastor,
Plaintiffs,

vs.

Hardware Mutual
Nettleship Co. of Los Angeles;
Pacific Indemnity Company;
Insurance Company of North America;
Sentry Insurance;
American Re-Insurance Company; and
North American Reinsurance Corporation,
Defendants.

[Filed Nov. 13, 1969]

COMPLAINT FOR DAMAGES AND INJUNCTIVE RELIEF UNDER THE ANTITRUST LAWS

(Jury Demanded)

The above-named plaintiffs, and each of them, acting on their own behalf and on behalf of all doctors in Los Angeles County who contract for malpractice insurance through defendant, Nettleship Co. of Los Angeles, bring this action individually and pursuant to Rule 23 of the Federal Rules of Civil Procedure, as amended, as representatives of the aforesaid class to obtain damages from and equitable relief against the above-named defendants, and, demanding trial by jury, complain and allege as follows:

I

CLASS ACTION

1. The plaintiffs herein bring this action for themselves separately and as representatives of a class on behalf of all the members thereof. The class represented by plaintiffs is composed of approximately 11,000 medical doctors in Los Angeles County who contract for professional liability insurance commonly and hereinafter referred to as medical malpractice insurance through defendant, The Nettleship Company. The class is so numerous that joinder of all members is impracticable, and there are questions of law or fact common to the class. The claims of plaintiffs, as representatives, are typical of the claims of the class. Plaintiffs are each specialists in a given field of medicine; the whole of them covering a broad range of medical practice. Plaintiffs, therefore, as representatives, will fairly and adequately protect the interest of the class.

II

JURISDICTION AND VENUE

2. This complaint is filed under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§ 15, 26) to secure damages from and injunctive relief against the named defendants for violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1, 2), as hereinafter alleged.

3. Each defendant maintains an office, transacts business or is found within this District and is within the jurisdiction of this Court for purposes of service. The interstate trade and commerce hereinafter described is carried on, in part, within said District. Moreover, the alleged unlawful acts and violations hereinafter described, including the combination and conspiracy to restrain trade and to monopolize, the individual attempts to monopolize and monopolization, have been conceived, carried out and made effective, in part, within the Southern District of California, and many of the unlawful acts done pursuant thereto have been performed by each defendant within said District.

III

THE PARTIES

4. Plaintiffs are all medical doctors licensed to practice medicine under the laws of the State of California with medical specialties and office locations as indicated below:

Walter Feinstein, Orthopedic Surgery, Beverly Hills, Calif.
Jason I. Green, General Surgery, Beverly Hills, Calif.
Jack Kriegsman, Orthopedic Surgery, Beverly Hills, Calif.
Leo Miller, Internal Medicine, Beverly Hills, Calif.
Morton H. Pastor, Anesthesiologist, Santa Monica, Calif.

5. Each defendant named herein is a corporation. At all times mentioned herein, said defendant was present and doing business in the State of California and can be found within the Central District of the State of California.

6. The Nettleship Company, (hereinafter Nettleship) which is hereby named a defendant herein, is engaged in the insurance brokering business and as underwriting managers for promoting, providing, selling and the issuing of policies of medical malpractice insurance in interstate commerce to medical doctors in the State of California, and for the providing of insurance carriers to whom the risk is allocated.

7. The remaining corporate defendants named herein are some of the insurance carriers of the aforesaid policies of medical malpractice insurance written by defendant Nettleship for the above-mentioned doctors.

IV

CO-CONSPIRATORS

8. Various other corporations and individuals not made defendants in this complaint participated as co-conspirators with the defendants named in the offenses charged herein and performed acts and made statements in furtherance thereof.

V

NATURE OF TRADE AND COMMERCE

9. Medical malpractice insurance is a professional liability insurance covering the negligent acts and omissions of doctors of medicine and hospitals during the course of care and treatment administered by them to patients who

come to them for diagnosis and treatment of medical problems. The contracts of insurance, usually written in form, are issued by the defendant insurance companies named herein, as well as other now unknown insurance companies in consideration for a premium paid by the insured medical doctor or hospital. Under the standard contract of medical malpractice insurance the insuror agrees to pay claims against the insured which arise by virtue of negligent acts or omissions on the part of the insured during the course of his or its care and treatment of patients, and the insurer further agrees to provide legal representation and services in negotiation and adjustment of such claims.

10. Defendant insurance companies named herein are among the principal insurers dealing in medical malpractice insurance. Through defendant Nettleship, these companies write virtually all of the medical malpractice insurance for the doctors in Los Angeles County.

11. The writing of medical malpractice insurance for doctors in Los Angeles County, California involves and requires the transmission of premiums, claims payments, correspondence and other monies in interstate commerce. During the period of time covered by this complaint, each defendant wrote medical malpractice insurance policies and conducted in interstate commerce those activities described above. There are, therefore, continuous and uninterrupted dealings throughout the United States in interstate commerce.

VI

BACKGROUND OF THE CONSPIRACY

12. In 1944, Nettleship began as a broker of medical malpractice insurance in Southern California. Steady growth of the medical doctors in the group desiring coverage forced certain changes. The carriers were, at first, Metropolitan Insurance Co., then Canadian Indemnity Co. In 1951, Zurich Insurance Co. became the sole carrier and maintained its sole position until January 1, 1963. On January 1, 1963, Nettleship found defendant Pacific Indemnity Co. to replace Zurich Insurance Co. Pacific has been the principal insurer since 1963 in the "pool" arrangement among the insurance carriers.

13. At all times relevant hereto, the carriers, operating in combination with Nettleship, combined and pooled their resources and capital, each agreeing to take a percentage of the risk. This combination is referred to herein as a "pool."

VII

OFFENSES CHARGED

14. Beginning at a time unknown to plaintiffs but at least prior to 1951 and continuing thereafter up to and including the date of filing this complaint, the defendants and others acting in concert with them have violated and are now violating Sections 1 and 2 of the Sherman Act by unlawfully contracting, combining and conspiring to monopolize, monopolizing and attempting to monopolize and by unlawfully contracting, combining and conspiring to restrain trade and commerce in medical malpractice insurance in California. Additionally, each defendant has attempted to monopolize said trade and commerce, and

defendants, individually and collectively, have monopolized said trade and commerce, all in violation of Section 2 of the Sherman Act.

15. The said unlawful monopoly, conspiracy to monopolize and to restrain trade in medical malpractice insurance in California have consisted and do consist of a continuing agreement and concert of action among the defendants, and each of them, to maintain substantial control of the market for medical malpractice insurance for medical doctors in Los Angeles County, and to eliminate competition therein so as to preclude said medical doctors from obtaining medical malpractice insurance from any other source; and to fix at an exorbitantly high premium rate so as to extract exorbitant profits.

16. In furtherance of said monopoly, conspiracy to monopolize, attempt to monopolize, and combination, conspiracy, and agreement in restraint of interstate trade and commerce, defendants, and each of them, have agreed to do, have attempted to do, and have done the following acts, among others:

(a) Suppressed by boycott or threat of boycott any independent insurance broker or carrier who attempted to provide competitive medical malpractice insurance to medical doctors;

(b) Fixed the prices of medical malpractice insurance to medical doctors at an exorbitant and outrageously high price;

(c) Forced, intimidated, threatened, and coerced, medical doctors to purchase all other necessary types of insurance coverage from defendants and co-conspirators as a

condition precedent to the issuance of medical malpractice insurance to said doctors;

(d) Had meetings between themselves and co-conspirators to determine arbitrarily high and non-competitive premium rates for medical malpractice insurance;

(e) Met and prepared biased, false and misleading statistical tabulations and other publications of defendants' and co-conspirators' financial position and of market trends in an attempt to justify and legitimize defendants' and co-conspirators' anti-competitive prices.

(f) Attempted to coerce, harass, and suppress any medical doctor from taking affirmative action to rectify and adjust this predatory situation, by threatening cancellation of said doctor's medical malpractice insurance, or in the alternative the charging of even higher insurance premiums to said medical doctor.

VIII

FRAUDULENT CONCEALMENT

17. The defendants and co-conspirators fraudulently concealed the existence of their conspiracy and discrimination by various means used to avoid the detection thereof, and as a result of such concealment the plaintiff had no knowledge and could not by the exercise of reasonable diligence have obtained the knowledge of the existenc of the conspiracy and discrimination.

18. By virtue of this fraudulent concealment, plaintiffs assert the tolling of any applicable statute or period of limitations affecting plaintiffs' rights of action herein.

IX

DAMAGES

19. As a result of the acts of defendants hereinabove alleged, plaintiffs and members of the class were denied the benefits of free and unrestricted competition in the sale of medical malpractice insurance and were compelled to pay substantially higher prices for medical malpractice insurance than would have been the case but for the violation of the antitrust laws. As a direct and proximate result of the unlawful conduct hereinabove alleged, each plaintiff and each member of the class has paid more for medical malpractice insurance than it would otherwise have paid, and the public has been forced to pay substantially more for medical services than would otherwise have been the case.

20. Plaintiffs have not ascertained the precise dollar amount of said damages; when said amounts have been ascertained, plaintiffs will ask leave of Court to amend this complaint to insert said amount herein.

WHEREFORE, each plaintiff prays:

1. That the Court adjudge this to be a proper class action;

2. That the Court adjudge that the defendants and co-conspirators have combined and conspired in restraint of trade and commerce hereinabove described and have combined and conspired to monopolize, and defendants have unilaterally attempted to monopolize and have, in fact, monopolized the trade and commerce hereinbefore described in violations of Sections 1 and 2 of the Sherman Act;

3. That each plaintiff and member of the class recover its damages which, when ascertained, must be trebled as required by Section 4 of the Clayton Act;

4. That each plaintiff and member of the class be awarded reasonable attorneys' fees as provided by Section 4 of the Clayton Act;

5. That each plantiff and member of the class recover the costs of litigation as provided by Section 4 of the Clayton Act;

6. That defendants be permanently enjoined and restrained from each and every one of the unlawful practices alleged in the complaint;

7. That plaintiffs have such other and further relief as the Court may deem just and proper.

Dated: November 10, 1969.

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Office - Supreme Court, U.S.
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No. 83-1381

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

WALTER FEINSTEIN, JACK KRIEGSMAN,
LEO MILLER, MORTON H. PASTOR and
JASON I. GREEN,
Petitioners,

vs.

NETTLESHIP CO. OF LOS ANGELES,
PACIFIC INDEMNITY COMPANY,
INSURANCE COMPANY OF NORTH AMERICA,
SENTRY INSURANCE A MUTUAL COMPANY,
AMERICAN RE-INSURANCE COMPANY, and
NORTH AMERICAN REINSURANCE CORPORATION
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

The question presented by the petition for certiorari distorts the factual bases of the decision below. The actual question presented is narrow. It is:

Did the court of appeals correctly conclude that there was no evidence before the trial court of any agreement to boycott, coerce or intimidate, or act of boycott, coercion or intimidation, within the meaning of § 3(b) of the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U.S.C. § 1013(b), and that the trial court, therefore, properly granted respondents' motions for summary judgment?*

*A list of respondents' subsidiaries and affiliates pursuant to Rule 28.1 is contained in Appendix A hereto.

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No. 83-1381

In the Supreme Court

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VS.

NETTLESHIP CO. OF LOS ANGELES, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

PRELIMINARY STATEMENT

Petitioners are doctors, members of the Los Angeles County Medical Association ("the Association"), who elected to purchase medical malpractice insurance in the period 1963-1969 through a group program sponsored by the Association. Their antitrust complaint, filed in 1969, asserted that the program violated the Federal antitrust laws. The district court granted summary judgment dismissing the action on the ground that it was barred by the McCarran-Ferguson Act, 59 Stat. 33, as amended, 15 U.S.C. §§ 1011-1015 ("the Act"). The court of appeals affirmed. It held that the offering of group medical malprac-

tice insurance to members of a county medical association is the "business of insurance" within the meaning of the Act (Appx. A to Pet., p. A-9). The court of appeals further held that the state-regulation requirement in § 2(b) of the Act is satisfied by California's "extensive regulatory scheme with jurisdiction over all rating practices of insurers, and which grants the insurance commissioner broad investigatory and enforcement powers" (*ibid.*). Finally, the court concluded, from its own examination of the factual record and of the agreement under which the group program was established, that there was no evidence of an agreement to boycott, coerce or intimidate or act of boycott, coercion or intimidation. As the court pointed out,

> "not only were doctors free to purchase insurance elsewhere, whether or not they joined [the Association], but several doctors in this case were covered by other companies at times during the relevant period" (Appx. A to Pet., p. A-10).

No reason exists for this Court to review the judgment. The decisions below turn principally on the lower courts' views of the factual record. There are no conflicting decisions, no novel or important issues of law and no elements of great public interest at stake. In addition, the decisions below are correct. Petitioners, though they were given every opportunity, simply failed to show any act or agreement of boycott, coercion or intimidation[1].

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[1]The McCarran-Ferguson Act limits the application of the Federal antitrust laws "'to the business of insurance to the extent that such business is not regulated by State Law'" (*St. Paul Fire & Marine Ins. Co.* v. *Barry* (1978) 438 U.S. 531, 539). The principal exception to this scheme of pre-emptive state regulation is § 3(b), providing for continued applicability of the Sherman Act to "any

STATEMENT OF THE CASE

Petitioners' statement of the case is inaccurate. The basic facts are set forth in the opinion of the court below (Appx. A to Pet., pp. A-1 to A-4).

Petitioners, at various times in the period 1963 through 1969, chose to purchase their medical malpractice insurance through a program sponsored by the Los Angeles County Medical Association. Respondents are the insurance brokerage firm that acted as underwriting manager for the program (The Nettleship Company of Los Angeles), one of the carriers (Pacific Indemnity Company) and four reinsurers.

It was undisputed that in 1969 when the lawsuit began, most medical malpractice insurance in California was written on a group basis (Appx. A to Pet., p. A-2). Typically, a master policy would be issued to a county medical society and individual certificates to each member physician who chose to be insured under the program. In consideration of a premium paid by the individual insured doctor, the insurer would agree to pay claims arising from his or her negligence in the course of treating patients and also to provide legal representation and services in negotiation and adjustment of claims (Appx. N to Pet., p. A-115).

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agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." A court addressing an application of the Act must ordinarily resolve three issues: (1) Are the activities complained of part of the business of insurance? (2) Are such activities regulated by state law? (3) Is there evidence of any agreement to boycott, coerce or intimidate or of any act of boycott, coercion or intimidation?

Under a written agreement made in 1944, the Association designated Nettleship as the "sole and exclusive agent approved by the association" (CR 781), such designation to continue only as long as the Association desired it (CR 781, 1763, 1766).[3] Nettleship agreed that coverage would not be limited to low risks but that policies would be offered generally to all Association members (CR 1764). The Association, on behalf of its members, was given a voice in such matters as policy forms, choice of counsel to defend claims, expert witnesses, educational and claims prevention activities and adjustment and settlement of claims and suits (CR 1764-1767). Nettleship undertook to provide annual reports to the Association concerning premiums, claims, reserves, estimated profits or losses, etc., pursuant to which rates could be revised to the extent that California law permitted (*id.*, at 1765-1766). Doctors desiring coverage under the particular group program sponsored by the Association had to belong to the Association to be eligible; however, Association members (and others) *at all times remained free to purchase medical malpractice insurance elsewhere if they chose* (Appx. A to Pet., p. A-3).

From 1967 on, Pacific Indemnity was the sole carrier for the program (Appx. N to Pet., p. A-116; Allen Decl., p. 2). Each year, Pacific Indemnity reinsured a portion of the risk by entering into individual reinsurance agreements with other insurance companies (Affidavit of Ralph Smith, filed Sept. 1, 1970, pp. 3, 17) ("Smith Aff."). Each rein-

---

[3]For a time, the Association approved another agent, Cass & Johansing, as well; Cass & Johansing offered policies issued by a different carrier under the group program from 1957 until 1967 (Declaration of John C. Allen Submitted Pursuant to Order of March 28, 1980, p. 2 ("Allen Decl.")).

surer agreed for a portion of the net premium to reinsure a portion of Pacific Indemnity's liability (*ibid.*). This is called "quota share reinsurance" and was and is recognized in the industry as a common risk-spreading device (CR 109-110, 216).

Petitioners' complaint alleged that since at least 1951, the respondents had conspired to monopolize and restrain trade in medical malpractice insurance and to fix exorbitantly high premium rates in violation of the Sherman Act (Appx. N to Pet., p. A-117). The complaint alleged that respondents engaged in various acts of boycott, coercion and intimidation (*id.*, pp. A-117 to A-118) and that as a result the petitioners "were compelled to pay substantially higher prices for medical malpractice insurance than would have been the case but for the violation of the antitrust laws" (*id.*, p. A-119). Respondents denied the allegations.

In 1977, the district court granted summary judgment in favor of respondents in reliance upon a Ninth Circuit decision[3] which had limited the scope of the "boycott" exception in § 3(b) of the McCarran-Ferguson Act to activity against insurance companies or agents. Petitioners appealed. While the appeal was pending, this Court overruled *Addrisi* and held that policyholders may also be included in the § 3(b) exception (*St. Paul Fire & Marine Ins. Co.* v. *Barry* (1978) 438 U.S. 531). In light of *Barry*, the Ninth Circuit remanded the instant case to the district court for reconsideration (Pet., p. 7). After further briefing, a *partial* summary judgment was ordered in favor of respondents.[4]

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[3] *Addrisi* v. *Equitable Life Assurance Society of U.S.* (9 Cir. 1974) 503 F.2d 725, *certiorari denied* (1975) 420 U.S. 929.

[4] The partial summary judgment was limited to petitioners' claim that respondents had coerced petitioners into the purchase of other

Petitioners then filed a motion (their fourth) for class certification. The petition (pp. 8-10) quotes *only part* of the hearing transcripts in connection with that motion. At the first hearing, the trial court indicated initially that a class would be certified (despite prior denials); the court deferred ruling on the class issue, however, noting that the factual basis for the allegations of boycott and coercion remained uncertain. The court ordered petitioners to submit a preview of their case-in-chief (Appx. E to Pet., p. A-27), advising them that after this material was assembled, " 'it may very well be that the Court will permit [respondents] to attack the sufficiency of the case you have made, even accepting . . . everything you have proffered . . . to be . . . true' " (Appx. E to Pet., p. A-27). At further hearing on February 2, 1981, the trial court found "that there is just noncompliance by the [petitioners] with the orders of the Court or at least the articulated requirements of the Court" with regard to petitioners' delineation of the evidence (R.T., February 2, 1981, pp. 14, 36). The court accordingly ordered a further particularization of petitioners' evidence (*id.*, p. 48).

The statement of evidence petitioners filed in response to the last order suggested a lack of genuine issues of material fact and respondents again moved for summary judgment. The district court, following thorough briefing and argument, granted the motions (Appx. E to Pet., pp.

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types of insurance as a condition to the offering of medical malpractice insurance. The trial court held that petitioners had failed to point to "any evidence" in support of that claim, and concluded that there was no issue of fact regarding it (Appx. G to Pet., pp. A-60 to A-61).

A-22 to A-55).[5] The Ninth Circuit affirmed (Appx. A to Pet., pp. A-1 to A-14). Petitioners' request for rehearing and for rehearing *en banc* was denied (Appx. A to Pet., p. A-15).

REASONS WHY THE WRIT SHOULD BE DENIED

1. The decision below turns upon an analysis of the particular facts which were proffered to the trial court and raises no important question which should be settled by this Court.

The petition's recital of matters allegedly "established" by the record (Pet., pp. 11-12), is based almost exclusively on prior arguments of petitioners' counsel which were not supported by the evidence. Most misleading is petitioners' erroneous contention that respondents "admitted" that they had unlawfully monopolized trade and commerce in insurance and "admitted" that they had exercised their unlawful monopoly power to exclude competition and unlawfully fix insurance rates in violation of California statute (Pet., p. 5). Respondents did not so admit, and the decisions below do not consider whether such actions would be within the antitrust exemption of the McCarran-Ferguson Act. Thus, the single question which the petition claims to be presented is not even before the Court.[6]

Respondents did concede for the purpose of the summary judgment motions that the trial court could accept as true whatever *evidence* petitioners pointed to bearing on the

[5] After the district court announced that the motions would be granted, but before it issued its opinion, petitioners twice sought mandamus from the Ninth Circuit asking, inter alia, that the district court be ordered to act. Those petitions were denied. Petitioners then sought certiorari in this Court, but withdrew their petition, then sought mandamus in this Court (*In re Feinstein, et al.*, No. 81-2153), which was denied.

[6] Respondents did argue that, absent some agreement or act of boycott, coercion or intimidation, alleged "monopolization" would not destroy the immunity conferred upon the business of insurance

issues raised by the motions. The trial court clearly understood the scope of respondents' *arguendo* concession (see Appx. E to Pet., pp. A-49 to A-50). In granting summary judgment, the trial court repeatedly distinguished between matters asserted by petitioners' counsel and matters as to which there was competent *evidence*. For example:

> "Plaintiffs charge a boycott of doctors practicing 'unaccepted therapies.' But there is *no evidence* of such a boycott * * *.
>
> "Plaintiffs also allege agreements among Defendants and others to divide the insurance market. Plaintiffs claim that one Defendant and another insurance company agreed not to provide the same type of insurance coverage in competition with each other. However, Plaintiffs have not produced *any evidence* of that agreement * * *.
>
> "Plaintiffs further charge that Defendant, Pacific Indemnity, and a Northern California insurance carrier mutually agreed not to compete in each other's markets. Once again, *no evidence* was presented on this issue for the Court's review * * *. [T]here is not sufficient evidence offered to even raise a triable issue of facts as to whether there was an agreement not to compete" (Appx. E to Pet., p. A-31, n. 7, emphasis added).

The court likewise observed:

> "Plaintiffs' counsel state that when [Association] officials waivered in their support of the group plan, the Defendants responded by threatening to drop the

---

by the McCarran-Ferguson Act (R.T., November 3, 1981, pp. 14-15). It was not necessary for the lower courts to reach that issue, however, since the record was clear that competing malpractice insurance plans were available to petitioners during the relevant period (see pp. 9-10, infra).

> membership requirement, discontinue financial support and cancel insurance policies issued to Directors of [the Association]. The Further Submission contains *no evidence* to support these allegations * * *" (Appx. E to Pet., p. A-54, emphasis added).

Petitioners nowhere explain how the trial court's view of the facts in this case, or the Ninth Circuit's concurrence with that view, could engender conflicts or confusion with other decisions of other courts. No conflicting decisions are cited. Moreover, the court of appeals applied only established principles of appellate review in considering whether there was any evidence of agreements or acts of boycott, coercion or intimidation.

Contrary to the assertions in the Petition, neither court below held that "an unlawful insurance monopoly was, as a matter of law, entitled to *McCarran-Ferguson Act* exemption" (Pet., pp. 5, 15). As the court of appeals noted, petitioners "focused their ire" (Appx. A to Pet., p. A-6) upon the 1944 agreement between the insurers and the Los Angeles County Medical Association that the Association's group insurance would be offered only to Association members. Petitioners, of course, were Association members. And, as the court of appeals pointed out:

> "Plaintiffs do not contend that the agreement itself forced them to buy the [Association] sponsored insurance from the defendants, or that it prevented them from dealing with other insurers. The only limitation in the agreement, and of which they complain, is the requirement that doctors join [the Association] as a prerequisite to being insured by defendants. Indeed, not only were doctors free to purchase insurance elsewhere, whether or not they joined [the Association], but several doctors in this case were covered by other

> companies at times during the relevant period. Because it in no way limited the doctors' ability to deal with third parties, the agreement itself is not an agreement to boycott or coerce the plaintiffs to purchase the defendants' insurance. [Citations.] There is no 'agreement to boycott, coerce or intimidate' within section 1013(b)" (Appx. A to Pet., pp. A-10 to A-11).

The foregoing also makes it unnecessary to consider petitioners' further theory (Pet., pp. 15, 26-27), that the mere existence of monopoly power, even though not effectuated or maintained by acts of boycott, coercion or intimidation, is inherently "coercive," and is therefore automatically within the boycott-coercion exception of the McCarran-Ferguson Act. As it was undisputed in the case at bench that there were competing insurance plans available to petitioners (Appx. E to Pet., p. A-50 (district court opinion); Appx. A to Pet., p. A-10 (court of appeals opinion)), no doctor situated as petitioners could be "coerced" because if he did not like the medical Association's group plan, he was free to buy insurance elsewhere. In view of the facts disclosed in the record, there is simply no reason to reach the question whether or not, as an abstract matter, the existence of an absolute or total monopoly could be characterized as "coercive."

Because petitioners' evidence did not support their arguments that there were acts of boycott or coercion, they were forced to contend "that anything which violates the policies of the Sherman Act is either boycott or coercion" (Appx. E to Pet., pp. 33-34, footnote omitted). The courts below properly rejected that contention. As this Court pointed out in *Barry*:

> "Whatever the precise reach of the terms 'boycott,' 'coercion,' and 'intimidation,' the decisions of this

> Court do not support the dissent's suggestion that they are coextensive with the prohibitions of the Sherman Act" (438 U.S. 531, 545, n. 18).

The suggestion that the lower courts' rulings have an impact beyond this particular case because they "den[y] remedy" to petitioners (Pet., p. 18) and bestow privilege on respondents to act unlawfully, is likewise misdirected. Petitioners chose not to assert any of the remedies provided to them by California's extensive regulatory scheme under which both insurance rates and underwriting rules are subject to review. Petitioners show no reason for Federal antitrust review of matters expressly within the contemplation of the state regulatory scheme.

2. The court of appeals correctly held that petitioners' claims were barred by the McCarran-Ferguson Act. There is no conflict with any other decision.

As the court of appeals correctly concluded, provision of group medical malpractice insurance to members of a medical association is the business of insurance. The Third Circuit has reached the same conclusion (*Owens* v. *Aetna Life & Cas. Co.* (3 Cir. 1981) 654 F.2d 218, 225-226, *certiorari denied* (1981) 454 U.S. 1092). Petitioners offer no contrary authority.

There is no basis for petitioners' erroneous suggestion that the state-regulation requirement in § 2(b) of the McCarran-Ferguson Act is not met unless the state has "sanctioned" or "approved" the challenged conduct (Pet., pp. 21, 23, 26). Petitioners' assertions in this regard are directly contrary to this Court's holding in *F.T.C.* v. *National Casualty Co.* (1958) 357 U.S. 560, 564, a case *not cited* in the Petition. In *National Casualty Co.* the Court held that where a state "has enacted *prohibitory* legislation * * * and

authorizes enforcement through a scheme of administrative supervision * * * the proviso in Section 2(b) [of the McCarran-Ferguson Act] *has been satisfied*" (357 U.S. 564-565, emphasis added; see also *Barry*, supra, 438 U.S. 551-552 and n. 24).

Petitioners' strained assertion (Pet., pp. 26-27) that the decision of the court below "conflicts substantially" with *Barry* on the necessity of state sanction and approval cannot survive examination. In *Barry*, the breadth of § 2(b) was "not in issue" (438 U.S. 540 and n. 9). Moreover, the Court in *Barry*, commenting on the *National Casualty Co.* holding, observed:

> "[T]he Court [in *National Casualty Co.*] *rejected* the Federal Trade Commission's argument that 'where a statute, instead of *sanctioning* a particular type of transaction, prohibits conduct in general terms and provides for enforcement through administrative action, there is realistically, in the absence of such enforcement, no "regulation" in fact' " (438 U.S. 552, n. 24, emphasis added).

California having enacted its own antitrust laws (which petitioners chose not to invoke) as well as laws comprehensively regulating the business of insurance, including rating practices of insurers who act in concert or engage in joint reinsurance, there is simply no basis for petitioners to question the conclusion that California's regulations satisfy the proviso to § 2(b).[7]

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[7]See California Insurance Code §§ 1850-1858.7, 12921, 12926.

Petitioners erroneously contend that *Owens* v. *Aetna Life & Cas. Co.* (3 Cir. 1981) 654 F.2d 218, *certiorari denied* (1981) 454 U.S. 1092, is inconsistent with the ruling below. Far from focusing on petitioners' "sanction" and "approval" theory, *Owens* simply found that the group insurance program in that case was regulated by state law (654 F.2d 222).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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(Appendix A follows)

APPENDIX A

LIST OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

Pursuant to Rule 28.1 of this Court's Rules, respondents provide the following information regarding their parent companies, subsidiaries and affiliates:

Pacific Indemnity Company

Pacific Indemnity Company has no subsidiaries other than wholly-owned subsidiaries and no affiliates. All of the stock of Pacific Indemnity Company is owned by Federal Insurance Company which is in turn a wholly-owned subsidiary of The Chubb Corporation. The following companies are subsidiaries (excluding wholly-owned subsidiaries)or affiliates of Federal Insurance Company or The Chubb Corporation: The Touchette Corp. (New York); La Federacion Compania de Seguros, C.A. (Venezuela); Seguros "Illimani" S.A. (Bolivia); UPA,Inc. (New Jersey); Bolivar Compania de Seguros del Ecuador (Ecuador); Chubb Syndicate Inc. (New York); Frank B. Hall (N.Y. I.E.) Inc. (Delaware); J & H WF Syndicate A (New York); La Federacion Compania de Seguros, S.A. (Colombia); DHC Corp. (Delaware); Argos Companhia de Seguros (Brazil); and Associated Aviation Inc. (New York).

Insurance Company of North America

Insurance Company of North America is a wholly-owned subsidiary of INA Financial Corporation, a wholly-owned subsidiary of INA Corporation which in turn is a wholly-owned subsidiary of CIGNA Corporation. Insurance Company of North America's subsidiaries (except thirty-three (33) wholly-owned subsidiaries) and affiliates (see 26 U.S.C. Sections 1501, 1502, 1504; Treas. Reg. Section 1.1502.1) are: Compagnie d'Assurances Colina S.A. (Ivory Coast); Compagnie Financiere INA (France); Compagnie Nouvelle d'Assurances (France); INA International Investors, Ltd. (Pennsylvania); La Nouvelle, S.A. (France); Paine Webber Incorporated (Delaware) and its seventy-four (74) subsidiaries and affiliates; and Societe Civile Immobiliere Turina (France).

In addition to the foregoing, the parent companies of Insurance Company of North America have varying ownership interests in over three hundred and seventy-six (376) other insurance, insurance-related, health care, real estate, and investment companies, both domestic and foreign, including Connecticut General Corporation and its subsidiaries and affiliates. Should the Court desire listings of these companies, and of the subsidiaries and affiliates of Paine Webber Incorporated, Insurance Company of North America will supplement its listing.

The Nettleship Company of Los Angeles

The Nettleship Company of Los Angeles was acquired by the Frank B. Hall Co. in 1973 and as part of that transaction was dissolved.

Sentry Insurance A Mutual Company

Sentry Insurance A Mutual Company has no subsidiaries (except wholly-owned) and no affiliates. The current respondent was formerly Sentry Insurance and Hardware Mutual Casualty Company.

North American Reinsurance Corporation

North American Reinsurance Corporation is owned by Swissre Holding (N.A.) Inc., New York, New York, which is owned by Swissre Holding Ltd., Zurich, which is owned by Swiss Reinsurance Corporation, Zurich. North American Reinsurance Corporation has no subsidiaries. Affiliated companies are: F & D Holding Corp. (Delaware); Fidelity & Deposit Company (Maryland); Fidelity & Deposit Company of Maryland (Maryland); NARe Life Mgmt. Co. Inc. (New York); North American Reassurance Company (New York); SR Geothermal Inc. (Delaware); Swiss-Am Reassurance Company; Swiss Reinsurance Co. (N.A.) Inc. (New York); Swissre Advisers, Inc. (New York); Swissre Corp. (New York); Swissre Life Insurance Company; Swissre Management Corporation; "Switzerland" General Ins. Co. Ltd. of Zurich (Switzerland); Switzerland Gen. Ins. Corp. of New York (New York); and Tudor Insurance Co. (New Hampshire).

American Re-Insurance Company

American Re-Insurance Company is a wholly-owned subsidiary of Aetna Life and Casualty, a Connecticut corporation. The following companies are subsidiaries of American Re-Insurance Company: American Excess Insurance Company (Delaware); A. M. Re Brokers, Inc. (Delaware); Am. Re. Managers of Texas, Inc. (Texas); and American Independent Reinsurance Company (Delaware).

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No. 83-1381

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

WALTER FEINSTEIN, JACK KRIEGSMAN,
LEO MILLER, MORTON H. PASTOR and
JASON I. GREEN,
Petitioners,

vs.

NETTLESHIP CO. OF LOS ANGELES,
PACIFIC INDEMNITY COMPANY,
INSURANCE COMPANY OF NORTH AMERICA,
HARDWARE MUTUAL CASUALTY COMPANY,
AMERICAN RE-INSURANCE COMPANY, and
NORTH AMERICAN RE-INSURANCE CORPORATION,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I

PRELIMINARY STATEMENT

The brief in opposition presented by respondents fails to address the single question of law[1] which petitioners request be accepted for review. Respondents make no credible effort[2] to reconcile the clear conflict between the decisions of the courts below and this Court's opinion in *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531 (1978). Nor do respondents offer any comment upon the conflict between the holdings of the courts below that unlawful monopolization is, as a matter of law, "barred by the *McCarran-Ferguson Act*" (*Appendix E*, p. 45) and "not within any exception to the *McCarran-Ferguson Act*" (*Appendix A*, p. 12) and the contrary view espoused by the Third Circuit[3]. Nor do respondents urge that the

---

[1]The legal question is:

> Whether the willful creation and maintenance of an admittedly unlawful insurance monopoly which excludes competition and which substantially damages consumers of insurance is exempt from prosecution under the federal antitrust laws by the *McCarran-Ferguson Act*, 15 U.S.C. §§ 1011-1013.

[2]While respondents make passing reference to this Court's opinion in *St. Paul v. Barry* (*Brief in Opposition*, p. 12), respondents entirely ignore this Court's teaching that prohibitory state legislation does not act to shield private monopolies from the federal antitrust laws:

> It is not disputed that Congress intended that certain forms of "regulation by private combinations and groups," 91 Cong. Rec. 1483 (1945) (remarks of Sen. O'Mahoney) *remain* subject to Sherman Act scrutiny, *notwithstanding* enactment of the type of "prohibitory legislation," coupled with "enforcement through a scheme of administration," that was deemed sufficient for § 2(b) purposes in *National Casualty Co. Id.* 551, fn. 24.

[3]*Travelers Insurance Corp. v. Blue Cross of Western Pennsylvania*, 306 F.Supp. 219, (1969); 351 F.Supp. 774 (1972) *aff'd Travelers Insurance Co. v. Blue Cross of Western Pennsylvania*, 481 F.2d 80, 85 (3d Cir. 1973); *cert. den.* 414 U.S. 1093 (1973).

opinions of the courts below—extending *carte blanche* to those who would unlawfully combine or act to monopolize insurance markets—fail to present an important question of federal law or to otherwise fully satisfy the special criteria normally employed by this Court in determining whether to allow issuance of its writ for review on certiorari.

Rather, respondents state that their opposition to issuance of this Court's writ is made on the ground that "the decision below turns upon an *analysis of the particular facts* which were proffered to the trial court" (*Brief in Opposition*, p. 7, emphasis added). The stated basis of respondents' opposition is frivolous, and is directly contravened by the position consistently taken by respondents throughout the fifteen year course of proceedings in the courts below. Accordingly, petitioners submit the following brief reply in order to address the procedural arguments—raised by respondents for the first time in their opposition—and in order to further demonstrate that the question presented to this Court is one of law, and is fully deserving of review on certiorari.

II

THE PROCEDURAL FACTS

A. The Allegations of Unlawful Monopolization

Contrary to the statements made by respondents, the complaint alleges an unlawful combination to monopolize and unlawful monopolization[4] as follows:

---

[4] During the period of defendants' unlawful monopoly, medical malpractice insurance was not available in Los Angeles County on a democratic (or republican) basis. There was no "election" involved. Neither did petitioners obtain insurance through a program which they "sponsored" as members of a medical association. To the contrary, all competition having been excluded by defendants, petitioners bought their policies at the point of an economic gun (Petition, p. 12; *Pastor Dep.*, pp. 20-22; *Kriegsman Dep.*, pp. 21-25; *Feinstein Dep.*, p. 120).

14. . . . [D]efendants and others acting in concert with them have violated and are now violating Sections 1 and 2 of the Sherman Act by unlawfully contracting, combining and conspiring to monopolize, monopolizing and attempting to monopolize and by unlawfully contracting, combining and conspiring to restrain trade and commerce in medical malpractice insurance in California. Additionally, each defendant has attempted to monopolize said trade and commerce, and defendants, individually and collectively, have monopolized said trade and commerce, all in violation of Section 2 of the Sherman Act.

15. The said unlawful monopoly, conspiracy to monopolize and to restrain trade in medical malpractice insurance in California have consisted and do consist of a continuing agreement and concert of action among the defendants, and each of them, to maintain substantial control of the market for medical malpractice insurance for medical doctors in Los Angeles County, and to eliminate competition therein so as to preclude said medical doctors from obtaining medical malpractice insurance from any other source; and to fix at an exorbitantly high premium rate so as to extract exorbitant profits (*Appendix N*, pp. 116-117).

These allegations constitute a short and plain statement of the monopolization claim, and adequately state a cause of action[5] for unlawful monopolization, *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746, 747 (1976). As previously noted, these were the allegations

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[5]The complaint alleges that respondents' unlawful monopoly damaged petitioners in that petitioners were:

> denied the benefits of free and unrestricted competition in the sale of medical malpractice insurance and were compelled to pay substantially higher prices for medical malpractice insurance than would have been the case but for the violation of the antitrust laws" (*Appendix N*, p. 119).

taken as true by the District Court for purposes of its ruling on the monopoly/exemption issue. (Pet. p. 14).

B. The Positions of Law Taken by the Parties in the Courts Below

The position of respondents in the courts below at all times was that Section 2(b) of the *McCarran-Ferguson Act*, 15 U.S.C. § 1012(b), operates to entirely exempt an admittedly unlawful monopolization of an insurance market from prosecution under the federal antitrust laws. More precisely, respondents have continuously contended that, as a legal proposition, an unlawful monopoly does not constitute an act of boycott, coercion or intimidation within the meaning of 15 U.S.C. § 1013(b), and have likewise contended that an unlawful combination to monopolize did not, as a matter of law, constitute an agreement to boycott, coerce or intimidate within the meaning of 15 U.S.C. § 1013(b). Respondents' contention has continuously been that, assuming the existence of an unlawful monopoly or combination to monopolize causing injury to petitioners' business or property, *something more was needed*. Specifically, respondents' contention was that, as a matter of law, petitioners were required to show some act or agreement of boycott, coercion or intimidation *other than* unlawful monopolization in order to avoid dismissal of their monopoly claims as barred by 15 U.S.C. § 1012(b).

In recognition of the plain fact that petitioners, had in opposition to defense motions for summary judgment, presented the District Court with a Rule 56(c) record which not only suggested a genuine issue of material fact as to the existence* of an unlawful combination to monopolize and actual monopolization, but which conclusively estab-

*Appendix A-I hereto is an excerpt from Appellant's Reply Brief, filed with the Circuit Court on May 2, 1963, which sets out certain of the evidence pertinent to respondents' maintenance of an unlawful monopoly.

lished an unlawful monopoly and its effects upon petitioners, respondents made certain concessions and stipulations in order to "focus" the District Court's attention upon the *legal* position which they urged be accepted. Thus, the following colloquy occurred between counsel for respondents and the District Court in connection with the defense motion for summary judgment:

> [Counsel for Pacific Indemnity] I would like very, very much to try to get this argument in focus, and I would like to suggest to the court, therefore, that *it may be assumed,* for the purpose of this argument, for the purpose of the motion made on behalf of Pacific Indemnity Company, that the plaintiff could make out *a perfectly good case of monopolization* or attempt to monopolize or a conspiracy or combination to restrain trade, and under the McCarran-Ferguson exemption, it would avail plaintiff nothing, unless there were sufficient evidence in the case to create a triable issue of fact, as to whether or not any of those alleged antitrust violations, monopolization, attempt to monopolize, conspiracy, combination to restrain trade, were effectuated by an agreement or act of boycott, coercion or intimidation.
>
> I think it would be probably absurd of us to come in here and ask the court to decide whether there was a combination or conspiracy and restraint of trade or monopolization or attempt to monopolize on a motion for summary judgment. (*Hearing,* 11/5/81; *TR.,* pp. 14-15).

Contrary to the legal position taken by respondents, petitioners have—continuously since 1969—taken the position that, irrespective of any state law purporting to either permit or proscribe insurance monopolies, the unlawful monopolization of interstate trade and commerce in an insurance market is not—by reference to the *McCarran-Ferguson Act* or otherwise—exempt or protected

from prosecution under the antitrust laws of the United States. The position of law taken by petitioners was that an unlawful combination to monopolize in fact constitutes an agreement to boycott, coerce and intimidate within the plain meaning of 15 U.S.C. § 1013(b), and was that unlawful monopolization constituted an act of boycott and economic coercion and intimidation in the highest and best sense of the statutory provision. Petitioners accepted the concessions and stipulations offered by defendants in connection with the motions for summary judgment, and argued the legal point to the District Court at length;

> [Counsel for Petitioners] Plaintiffs now have and have always had a single interpretation of the McCarran Act, what activities are exempt by reason of the McCarran Act, and it hasn't been agreed with by defendants, and at one point wasn't agreed with by Judge Kelleher.
>
> Your honor, in St. Paul [*Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531 (1978)]—and this is at pages 547, 548 of the United States Report—the Supreme Court was dealing with, among other things, the question of who, what class of persons might maintain a private civil action where it was shown or admitted, for purposes of the pleadings, that conduct which amounted to boycott, coercion or intimidation in fact occurred.
>
> In dealing with that question, the Supreme Court was required to address and did address the general scope of the McCarran Act, and the Supreme Court did so in both the majority opinion and in the dissent. Both the majority opinion and the dissent were in agreement, basically, as to the general scope of the McCarran Act, the scope of the exemption; they were in disagreement as to who could invoke the 3(b) exception. That is where they disagreed.

Justices Rehnquist and Stewart said it had to be persons in that insurance industry, and the majority, of course, held that that wasn't so. But the majority opinion on the question of rates that counsel mentioned and on the question of monopoly that counsel have mentioned, and which has been briefed to the court, the majority opinion states:

"The congressional debates make clear that the boycott exception was viewed by the Act proponents as an important safeguard against the danger that insurance companies might take advantage of purely permissive state legislation to establish monopolies."

And that is at page 547.

On the question of monopolies, then, your honor, the clear reading of the majority opinion in St. Paul was that, even if a state were to, by legislation, act to authorize or permit a monopoly, that activity by the state would not be sufficient to render that monopoly exempt or immunized from the federal antitrust laws. That is what they construed 3(b) to mean in part.

Now, on this point of monopoly and price fixing, the dissent also has something to say, and it is in agreement with the majority on this point.

This, your honor, is at page 550 of the St. Paul opinion.

Justice Rehnquist, I believe—I am not certain whether he wrote it or not. Rehnquist and Stewart state:

"Repeatedly, Congressmen involved in the drafting of the statute drew a distinction between state regulation and private regulation. Congress plainly wanted to allow the states to authorize anticompetitive practices when determined to be in the public interest as indicated by formal state approval."

Then they footnote the congressional debates.

"Congress just as plainly wanted to make sure that private organizations set up to govern the industry would not escape the reach of the federal antitrust laws. Section 2(B)—"

NOT 3(B)—the boycott, coercion and exemption Section *2(B)*.

"Section 2(B) also meets this concern to the extent that states do not authorize or sanction or approve of anticompetitive practices promoted by such organizations."

That is at page 565.

And Counsel himself read the footnote from Barry, which indicates that it is state sanctioned—that is to say, state approved, price fixing that falls within the exemption provided by 2(B). That has always been the position of plaintiffs in this action, from day one.

• • •

The Court ought to deal with those questions: Is it true that monopoly, admitted monopoly, is exempt from the federal antitrust laws by the McCarran Act? Is that true, as a legal proposition?

Is it true that agreements to fix prices which are prohibited by the state law, which are not approved by the Insurance Commissioner, are exempt from federal prosecution by reason of the McCarran-Ferguson?

The answer to those questions is absolutely no. Any fair reading—any reading, really, any reading of the Congressional Record—and we have given the Court the excerpts and the case law—suggest that the answer is no. It is a flat no. [*Hearing*, 11/5/81, *TR.* pp. 55-58, 63][1]

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[1]Respondents clearly recognized and commented upon the position of law taken by petitioners in opposition to the motions for summary judgment:

Respondents flatly conceded that petitioners could make out a "perfectly good case of monopolization." They expressly invited the District Court to assume that unlawful monopolization had been fully established. As demonstrated in the petition, the District Court accepted respondents' invitation, eschewed reference to the Rule 56(c) record facts evidencing the monopolization claims, and erroneously accepted respondents' legal argument that unlawful monopolization was "barred by the *McCarran-Ferguson Act*." [Pet. pp. 12-15]. Thus, respondents' assertion that "the decision below turns upon an analysis of the particular facts which were proffered to the trial court" does not stand scrutiny, and provides no proper basis for opposing issuance of this Court's writ.[8]

[Counsel for Pacific Indemnity]

> The arguments we have heard today that monopolization in any event is not within the McCarran Act exemption, which I believe is unsupported by any case or any academic discussion [*Hearing, TR.* p.83].

[Counsel for Sentry]

> Counsel concludes by saying that he wants a ruling that monopoly and unapproved price fixing are exempt or not exempt under the law. It is clear this is the plaintiff's main point [*Hearing*, 11/05/81, *TR.* p. 87].

[8]Like the District Court, the Court of Appeals below treated the question of *McCarran-Ferguson Act* exemption as a question of law and held:

> Thus even if plaintiffs could establish a violation of Section 2 of the Sherman Act in this case, *some additional* act or agreement constituting boycott coercion or intimidation *would have to be shown* [*Appendix* A, p. 12, emphasis added].
>
> and
>
> Monopoly alone is therefore not within any exception to the McCarran Ferguson Act [*Appendix* A, p. 12]

III

CONCLUSION

The opinions of the courts below decide a question of federal law in a way which substantially conflicts with this Court's decision in *St. Paul v. Barry, supra*, and with the law as followed by the Third Circuit. The question of whether an unlawful insurance monopoly is exempt from prosecution under the federal antitrust laws is one which has a substantial impact nationally in both the insurance and health care sectors of the economy. Petitioners most respectfully submit that the question presented is one which the Court should, in the exercise of its sound discretion, accept for review. Accordingly, petitioners ask that the Court permit issuance of its writ.

Dated: April 30, 1984

Respectfully submitted,

ALIOTO & ALIOTO
JOSEPH M. ALIOTO
LAWRENCE JOHN APPEL

By LAWRENCE JOHN APPEL
One of the Attorneys for Petitioners

(Appendix A-1 follows)

Appendix A-1

E. Maintenance of Monopoly Power

The record before the district court was that, by August, 1966, the Nettleship pool had "little or no competition." At the same time, the pool learned that *members* of the medical associations were attempting to "establish their own insurance company." (*Further Submission*, 1/13/81, pp. 103-104). As seen, the Nettleship pool's market position was obtained through concerted refusals to deal resulting from private agreements between Nettleship and various medical associations,[1] which agreements in turn were aimed toward the elimination of a "multitude of brokers" from the Southern California medical malpractice insurance market. (*Further Submission*, 1/13/81, p. 12). Although the facts and testimony specified in plaintiffs' January 13, 1981 *Further Submission* ought to be fully considered on these points, the record submitted to the district court concerning the course of conduct undertaken by defendants at a time when they had little or no competition in the Southern California medical malpractice insurance market may be briefly summarized in the following fashion.

In December, 1966, subsequent to its acquisition by INA, Pacific Employers Insurance Company withdrew from the Southern California medical malpractice insurance market, leaving Nettleship as the sole broker "approved" by any of the original eleven Southern California county medical associations. All of the Pacific Employers insureds were immediately referred to Nettleship for malpractice insurance, and, in July, 1967, the Nettleship pool expanded its

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[1] It must be stressed that these agreements were employed to both force membership and to require that physicians remain members of the county, state, and national medical associations. (*Further Submission*, 1/13/81, pp. 121, 122, 164, 165).

operations into San Diego. (*Further Submission*, 1/13/81, pp. 108, 109, 122-124).

In September, 1967, the Nettleship Pool met and determined that "competition in this market has lessened to such an extent that the rate increase proposal of the INA for next year was accepted without question by the Nettleship Company." (*Further Submission*, 1/13/81, p. 127).[28] In the meantime, the medical association officers put Nettleship's agreement to boycott to its intended use as an economic club. Thus, in 1967, an individual physician wrote to Nettleship and complained:

> Reference is also made to our privilege [sic] communication relative to the current concept that it is impossible for local physicians to obtain liability insurance without being an active member in the Medical Society.
>
> At the moment a major factor in our not causing a real breach within the [medical] society is the fact that the *society holds over our head* the fact that we would be *unable to obtain liability insurance without being an active member in the society.*
>
> There are approximately 20 of us involved in the current "conflict" [with the County Medical Society]. I would be most interested to learn if it would be possible for an individual like myself for example to obtain liability insurance as a person *without membership* in the local Medical Society. I would also like to know if it would be possible for a *group* of us to get together as a separate unit and apply for liability insurance through your company. (*Further Submission*, 1/13/81, p. 131).

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[28] At the same time defendant Sentry was advised that "only approximately $5 million was actually paid out in losses [on the Nettleship business] against a written volume of $19,000,000." (*Further Submission*, 1/13/81, pp. 130, 131).

In January, 1968, Pacific Indemnity and INA increased their percentage participations in the Nettleship pool, and Nettleship offered to pay LACMA $6,000.00 per year "so long as [Nettleship remained] the sole approved professional liability broker." (*Further Submission*, 1/13/81, pp. 140, 147, 148). Thereafter, on August 15, 1978, LACMA attempted to obtain the renewal dates on Pacific Indemnity policies from Nettleship so that other malpractice markets might be investigated. Eleven days later, Nettleship attended a meeting of the pool and, after a rate increase of 75% had been agreed to, advised those present that "he can *control* the . . . medical associations." (*Further Submission*, 1/13/81, pp. 151-152, 156). Accordingly, on September 4, 1968, Nettleship wrote to LACMA and flatly refused to provide the requested policy renewal dates because they "would only be valuable to another carrier who might decide to compete with the program." (*Further Submission*, 1/13/81, pp. 157, 158).[23] On March 24, 1969, the members of the Nettleship pool met in New York, and Nettleship advised those present that "our program probably has a 98-99% market penetration." Referring to its refusal to provide policy renewal dates, Nettleship advised further that "abortive attempts to start new malpractice companies

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[23] At the same time, and in answer to requests by individual physicians that LACMA attempt to itself break up the Nettleship pool's monopoly, Nettleship reminded LACMA of the benefits it was conferring on LACMA by its continued boycotting activity, and in a letter to LACMA's president stated: "We [Nettleship] had to threaten to terminate Dr. Allred's insurance because he failed to file a [membership] application. It appears that he *only joined the Association to avoid cancellation* of his professional liability insurance." (*Further Submission*, 1/13/81, p. 165). After the instant suit was filed, Nettleship would admit that there were "many fine doctors who maintained [medical association] membership *only* in order to obtain our insurance." (*Further Submission*, 1/13/81, p. 272).

have to date been unsuccessful." (*Further Submission*, 1/13/81, p. 180).

In May and June, 1969, Nettleship, INA, and Pacific Indemnity obtained confidential information respecting the formation of a competitive malpractice insurance company to be called "Professional Alliance Insurance Company." (*Further Submission*, 1/13/81, pp. 183, 184, 185, 186-188). Thereafter, on June 19, 1983, Nettleship wrote to the LACMA medical review committee respecting its possible endorsementof Professional Alliance, and brazenly and unlawfully threatened to cancel the insurance policies of any physicians who became stockholders in or directors of the Professional Alliance Insurance Company. Even more significantly, Nettleship threatened to drop the association membership requirement if LACMA approved a competing carrier. (*Further Submission*, 1/13/81, pp. 191-192; *Affidavit of Lawrence John Appel*, ¶ 3[d], filed 2/25/74; Dkt. 1691, ¶ 41; Dkt. 1774, ¶ 41).

In August, 1969, the Nettleship pool met again and agreed to a rate increase of 75% "to follow on the heels of last year's [1968] 100% increase." (*Further Submission*, 1/13/81, p. 205). Thereafter, in September, 1969, Allen reported to the pool that he had met with representatives of the twelve county medical associations and reported an "air of resignation on their parts" respecting the 1969 rate increase. (*Further Submission*, 1/13/81, p. 215). For his own part, Allen reported that:

> When we [the pool] proposed our rate increase *he* [Allen] initially became very shocked, and since that time has *simmered down to the reality* that the doctors have *no where else to go*. (*Further Submission*, 1/13/81, p. 218).

Faced with the threat of further, arbitrary, exactions by the Nettleship monopoly, and advised that the hands of the

California Insurance Commissioner were tied,[24] plaintiffs filed the instant action in November, 1969, and after Nettleship had advised that "we have a gun to your head and there is nothing you can do about it" (*Feinstein Dep.*, p. 139), Nettleship responded by filing a spurious $10 million counterclaim in the hope of producing a "Mexican standoff." (*Brief for Appellants*, p. 4, fn. 5).

III

THE PARTIAL EXEMPTION PROVIDED BY THE McCARRAN-FERGUSON ACT HAS NO APPLICATION TO THE ALLEGATIONS OR CONDUCT IN ISSUE

The *McCarran-Feguson Act* was not designed to confer any right or privilege on insurance companies. Rather, its basic purpose was to allay doubts thought to have been raised by the decision of the Court in *United States v. Southeastern Underwriters* • • •

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[24]In May, 1969, plaintiff Feinstein wrote to the California Insurance Commissioner and complained about medical malpractice insurance rates and policy forms. On June 11, 1969, the California Insurance Commissioner responded and formally advised:

> We regret to advise that there is *no* general requirement that insurance policies be approved by this Department prior to issuance. . . .
>
> No liability insurance policies are required to be filed with us. If one were so filed, *we would not have the statutory authority to either approve or disapprove it.*
>
> Whether or not the Los Angeles County Medical Association is to be condemned for their efforts in obtaining the coverage to which you refer *is not a question on which we would care to comment.* (*Feinstein Dep.*, Ex.-1).